No. (2)
Supreme Court, U.S.
FILED
001611 APR 20 2001
IN THE
SUPREME COURT OF THE UNITED STATES 2001
OFFICE OF THE CLERK

MIGUEL RICHARDSON,
Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI VOLUME I, PAGES 1-295

THIS IS A CAPITAL CASE

STEVEN B. ROSENFELD
Counsel of Record
MARIA H. KEANE
PAUL H. COHEN
TRACY DREISPUL
KATHERINE I. PUZONE
Paul, Weiss, Rifkind,
Wharton & Garrison
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

DANIEL MCNEEL LANE
Akin, Gump, Strauss
Hauer & Feld
1500 Nations Bank Plaza
300 Convent Street
San Antonio, Texas 78205
(210) 281-7000

Counsel for Petitioner Miguel Richardson

296028

2001 U.S. APP. LEXIS 1621 printed in FULL format.

Richardson v. Johnson

00-50418

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

2001 U.S. App. LEXIS 1621

January 23, 2001, Decided

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: United States District Court for the Western District of Texas.

5:98-CV-775.

OPINION: Affirmed

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50418

MIGUEL A. RICHARDSON,

Petitioner-Appellant,

versus

GARY L. JOHNSON, DIRECTOR,
TEXAS DEPARTMENT
OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(5:98-CV-775)

Before HIGGINBOTHAM, DeMOSS, and STEWART,
Circuit Judges.

CARL E. STEWART, Circuit Judge:*[1]

---

[1] Pursuant to 5TH *CIR.* R. 47.5, the court has determined that this opinion should not be published and is not

Petitioner, Miguel Richardson ("Richardson"), appeals the district court's denial of a certificate of appealability ("COA"). Because we find that the district court did not err in denying the COA, we affirm the ruling and vacate the stay of execution.

FACTUAL & PROCEDURAL HISTORY

On September 18, 1981, Richardson was convicted of capital murder under Texas Penal Code Ann. § 19.03 and sentenced to death for the March 31, 1979, murder of John G. Ebbert, a security guard at a Holiday Inn in San Antonio, Texas. During voir dire, the state trial court excused *sua sponte* a prospective juror, William Noble ("Noble"), who stated that he had already prejudged the case and that he was opposed to the death penalty. At the penalty phase of Richardson's trial, Dr. Robert Rast, an expert witness and psychiatrist for the State, testified that although he had not examined Richardson, Richardson was a "threat to society" and a "psychopath." The State notified Dr. Rast that it would call him as a witness one day before he gave his testimony, and it promptly notified Richardson regarding the proposed testimony.

On June 1, 1994, the Texas Court of Criminal Appeals ("CCA") affirmed Richardson's conviction and death sentence, and it denied Richardson's motion for rehearing on September 21, 1994. Richardson filed a petition for a writ of habeas corpus in the 175th District Court of Bexar County. That court conducted a four-day evidentiary hearing on

---

precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

April 29 through May 2, 1997, in which Richardson presented evidence of a childhood history of sexual and physical abuse and evidence regarding the absence of written guidelines and protocols regulating lethal injections in Texas. Richardson's petition, however, was denied.

On October 8, 1998, Richardson filed a petition for COA in federal district court. The district court denied relief on March 28, 2000. Richardson filed a Motion to Alter and Amend the Judgment of the District Court on April 11, 2000, which was denied on April 16, 2000. Richardson now appeals.

DISCUSSION

This Court may not issue a COA "unless the State court's adjudication of the claim resulted in 'a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court . . . ; or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Knox v. Johnson, No. 99-41068, slip op. at 5280 (5th Cir. filed August 21, 2000) (citing 28 U.S.C. § 2254(d)).

The Supreme Court recently announced in Slack v. McDaniel somewhat different standards for the issuance of a COA under AEDPA. It noted that "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 120 S. Ct. 1595, 1603-04 (2000).

Moreover, "[w]hen the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. In addition, this Court will defer to a state court's factual findings "unless they were 'based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.'" Knox v. Johnson, No. 99-41068, slip op. at 5280 (citing Chambers v. Johnson, 218 F.3d 360, 363 (5th Cir. 2000)).

I. Whether the trial court violated Richardson's Fifth and Sixth Amendment Rights by dismissing a venireperson

Richardson argues that the state trial court erred when it excluded Noble, whom Richardson argues qualifies under Witherspoon v. Illinois because he expressed opposition to the death penalty. 391 U.S. 510, 521-23 (1968). Richardson also argues that the CCA erred when it held that the trial court harmlessly erred when it excused Noble. The CCA determined that although the trial court asked Noble whether he had formed an opinion regarding Richardson's guilt or innocence, the trial court did not ask him whether that opinion would influence his verdict as required by Tex. Code Crim. Proc. 35.16(a)(10).

Contrary to Richardson's assertion that Noble was excused because he opposed the death penalty in violation of Witherspoon, Noble was in fact excused *sua sponte* by the trial court during voir dire because the court believed that he

had already prejudged the case. Moreover, although Richardson notes that a Witherspoon error may never be harmless error,[2] the CCA stated that Noble's dismissal was error because Texas law holds that a juror must be asked whether his conclusion will influence his verdict. Richardson v. State, 744 S.W.2d 65, 68 (Tex.Cr.App. 1987). The CCA's holding, therefore, regarding error had nothing to do with a Witherspoon violation.

The CCA, however, concluded that this error was harmless because Richardson had not shown that he was harmed by the trial court's action since the State had not used all of its peremptory challenges. Id. at 68-69. Thus, we affirm the trial court's ruling on this issue since reasonable jurists would not find the district court's assessment of the alleged Witherspoon claim debatable or wrong.

II. Whether Dr. Rast's testimony violated Richardson's Fifth and Sixth Amendment Rights

Richardson's main argument for this issue is that Gardner v. Florida, 430 U.S. 349 (1977), applies to this case and that Gray v. Netherland, 518 U.S. 152 (1996), is inapplicable.[3] Dr. Rast testified in part that Richardson was a

---

[2] Richardson cites Gray v. Mississippi, 481 U.S. 648, 668 (1987).

[3] Richardson complains that the state trial court erred in permitting Dr. Rast, a "surprise witness," to testify, thereby depriving him of effective assistance of counsel and violating his due process rights. Upon review of the transcript of the evidentiary hearing conducted by the

"threat to society" and a "psychopath," yet he candidly admitted that he had not examined him. Richardson asserts that Gardner, in which the Court held that the trial court denied petitioner's due process rights because it sentenced him "to death on the basis of information which he had no opportunity to deny or explain," is controlling precedent.

Gardner is distinguishable from the instant case because the confidential portions of the presentence report remained undisclosed to all parties in that case. Moreover, the defense received no opportunity at trial to examine the confidential report. Here, however, although Richardson was not aware of Dr. Rast's testimony until the day before he testified, he was afforded a lengthy opportunity to cross-examine Dr. Rast.

More importantly, this case is governed by Gray v. Netherland which involved the testimony of two additional witnesses, a medical examiner and a police officer, regarding additional murders the Petitioner had allegedly committed. Like Richardson, the Petitioner in Gray v. Netherland received only a day's notice of the testimony, yet the Court noted that there is "no general constitutional right to discovery in a criminal case . . ." 518 U.S. at 168-171. It held that Petitioner's notice of evidence claim regarding the two witnesses was barred by Teague v. Lane, 489 U.S. 288 (1989), because it sought "retroactive application of a new rule." Id.

---

court on this issue, we find no error and decline to elaborate further.

Richardson contends that Gray is inapplicable to his case because the evidence at issue involved "cumulative witnesses" instead of a witness who is the State's sole expert on future dangerousness. This argument is not persuasive given that the principle behind Gray and the instant case is the same: notice of evidence claims are Teague-barred. It matters little how many witnesses constitute the evidence. Moreover, although Richardson asserts that Gardner is applicable, the Court in Gray distinguished that case by noting that although "Gardner literally had no opportunity to even see the confidential information . . . [p]etitioner in the present case, on the other hand, had the opportunity to hear the testimony of Officer Slezak and Dr. Presswalla in open court, and to cross examine them." Gray, 518 U.S. at 168-69. Here, as in Gray, Richardson was afforded the opportunity of hearing the testimony of Dr. Rast and cross-examining him. The law is, therefore, clear that the district court did not err when it granted relief on this issue and reasonable jurists would not find the district court's assessment of this issue debatable or wrong.[4]

---

[4] Richardson also argues that Estelle v. Smith 451 U.S. 454 (1981) and Gholson v. Estelle 675 F.3d 784 (56 Cir. 1982) are instructive. Although these cases involved the admission of testimony of "surprise witnesses," these witnesses were psychiatrists who had previously interviewed the defendants and who later testified about the future dangerousness of the defendants based on their examinations. In both cases, however, the courts focused on the lack of an attorney during the examination as the reason for their holdings. Here, there is no such issue, as Dr. Rast admitted that he had not interviewed Richardson.

III. Whether the trial court erred by not giving a Penry instruction even though mitigating evidence regarding childhood abuse was not presented

Although Richardson admits that he did not present mitigating evidence regarding childhood sexual and physical abuse at trial because of his fear that a Penry-type instruction would not be given, he argues that because he presented such evidence at the state habeas corpus hearing, this Court should hold that the district court erred by not giving such an instruction. The district court extensively examined this issue and found that Richardson's claim lacked merit.

We agree with the district court's assessment because Richardson cites no precedent stating that a trial judge erred by not giving a Penry-type instruction when there was nothing about which to instruct. See Boyd v. Johnson 167 F.3d 907, 912 (5th Cir. 1999) ("A petitioner cannot base a Penry claim on evidence that could have been but was not proffered at trial."); see also Woods v. Johnson, 75 F.3d 1017, 1033(5th Cir. 1996) ("We have consistently held that a Penry v. Lynaugh, 492 U.S. 302,109 S. Ct. 2934,106 L. Ed. 2d 256 (1989), claim may not be predicated on 'evidence' which was not offered or tendered (conditionally or otherwise) at trial."). Hence, the trial court did not err in denying a COA on this issue.

IV. Whether the lack of written guidelines and protocols for executions by lethal injection in Texas violates Richardson's Eighth Amendment rights

Richardson creatively argues that the lack of written guidelines and protocols to administer executions by lethal injection in Texas violates his Eighth Amendment rights against cruel and unusual punishment. Richardson presented the testimony of two experts, a criminologist and anesthesiologist/pharmacologist, at the state habeas corpus hearing. They testified regarding the effects of extreme pain and suffering as a result of lethal injection and specific instances which resulted in extreme pain and suffering involving lethal injection, respectively. However, as the district court points out, this Court has upheld the use of lethal injection as a method of execution. See Woolls v. McCotter, 798 F.2d 695, 697 (5th Cir. 1986); see also Kelly v. Lynaugh, 862 F.2d 1126, 1135 (5th Cir. 1988) (stating that this Court has already rejected the argument that lethal injection is cruel and unusual punishment even when administered by an unqualified person). Moreover, as the district court further notes, Richardson is in essence petitioning for the application of a new rule which is barred by Teague.

We also agree with the district court's assessment that the expert testimony given by Drs. Edward Brunner and Deborah Denno at the state habeas corpus hearing is not helpful on this issue. Although the district court emphasizes that the experts were unable to testify how lethal injections are administered in Texas, we agree with its finding that the experts failed to show how the lack of written procedures results in extreme pain and suffering.

For example, Dr. Denno, the criminologist, testified that there have been 11 botched executions out of 115 total executions in Texas by lethal injection. Dr. Denno admitted that seven out of these eleven botched executions resulted not because of a lack of written procedures, but because the officials took care to find a suitable vein on individuals who were long-time intravenous drug users and who had much vein-scarring. Accordingly, there are only four out of a total of 115 executions administered by lethal injection which may be deemed "botched" according to Dr. Denno. It is unclear whether these failed efforts occurred because of a lack of written procedures or because of human error. Richardson's evidence is insufficient to show that Texas violates individuals' Eighth Amendment rights because of a lack of written guidelines in administering executions by lethal injection.

Dr. Brunner was also unable to explain the link between written guidelines and decreased pain and suffering during lethal injection. In addition, he noted that there is nothing to indicate that Texas is doing anything incorrectly in administering lethal injection. Thus, the district court did not err by denying a COA for this issue.

CONCLUSION

Because we find that Richardson's Fifth and Sixth Amendment rights were not violated when the state trial court excused venireperson Noble and when Dr. Rast testified during the penalty phase of the trial, Richardson's Eighth Amendment rights were not violated by a lack of written guidelines and protocols for executions by lethal injection in Texas, and the state trial court did not err by not giving a

Penry instruction, we affirm the district court's denial of a COA and vacate the stay of execution.

AFFIRMED. STAY OF EXECUTION VACATED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MIGUEL A. RICHARDSON,	§	
Petitioner,	§	
v.	§	
GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,	§	**CIVIL NO. SA-988-CA-775-FB**
Respondent.	§	

ORDER DENYING MOTION TO ALTER AND AMEND JUDGMENT

The matter before the Court is petitioner's motion to alter or amend judgment filed April 11, 2000.[1]

In a detailed Memorandum Opinion and Order issued March 28, 2000, this Court explained at length why all of the petitioner's claims for relief in this federal habeas corpus are foreclosed by well-settled case law and, additionally, that most of his claims are also barred by the non-retroactivity doctrine of **Teague**, the doctrine of harmless error, or both.[2] This Court also denied petitioner a Certificate of

---

[1] See docket entry no. 25.

[2] See docket entry no. 23.

Appealability ("CoA"), citing the multiple barriers to relief that existed with regard to each of his claims herein.

On April 11, 2000, petitioner filed a pleading styled "Memorandum of Law in Support of the Motion by Petitioner Miguel A. Richardson to Alter and Amend Judgment," in which petitioner argues that (1) this Court employed an unduly restricting standard in denying petitioner a CoA, (2) he is entitled to federal habeas relief because the Texas Court of Criminal Appeals erroneously applied the state law doctrine of harmless error in denying petitioner's pseudo-**Witherspoon** claim,[3] and (3) petitioner's trial counsel were "chilled" from presenting evidence of petitioner's allegedly difficult childhood at the time of petitioner's 1981 capital murder trial.

These arguments are without merit. This Court applied the correct legal standard in denying petitioner a CoA.[4] There is no basis for discord among jurists of reason

---

[3] Contrary to the assertions in petitioner's latest pleading, the Texas Court of criminal Appeals' construction and application of state law rules of harmless error do not raise an arguable constitutional claim with regard to petitioner's purported **Witherspoon** claim because the holding in **Witherspoon** is irrelevant to the facts of petitioner's case. Federal habeas corpus relief exists to ensure that a prisoner's federal constitutional rights are protected, not to ensure proper application of state law principles.

[4] See **Lamb v. Johnson**, 179 f.3d 352, 356 (5th Cir.), **cert. denied**, 120 S. Ct. 522 (1999) (holding that while the nature of the penalty involved in a capital case is a proper consideration in determining whether to grant a CoA, the

on the fact that virtually all of petitioner's claims herein, including his pseudo-**Witherspoon** claim, are foreclosed by the **Teague** doctrine. Furthermore, petitioner's "chilling" argument has been repeatedly rejected by the Fifth Circuit in cases in which the Supreme Court has denied certiorari.

The short answer to petitioner's "chilling" argument claim is the attorneys for Mr. Penry were not foreclosed or "chilled" from presenting the same type of evidence petitioner argues he was unable to present at his trial. Furthermore, petitioner's trial counsel testified at the evidentiary hearing in state court that he was aware of no evidence of the nature petitioner presented at the state court hearing on petitioner's state habeas corpus application. Furthermore, said counsel testified that he met prior to trial with the same brother of the petitioner who later professed ignorance of the fact the petitioner was on trial for capital murder and then came forward years later with bizarre allegations of child abuse that completely contradicted the trial testimony of petitioner's family and pastor regarding the idyllic upbringing the petitioner enjoyed as a child. Petitioner's trial counsel did not render ineffective assistance by failing to present evidence which would have undermined their trial strategy of showing the petitioner did not pose a threat of future violence. Likewise, petitioner's trial counsel could hardly have been "chilled" from presenting evidence of which he was never made aware of by either the petitioner or petitioner's family.

For the reasons set forth in this Court's 158-page Memorandum Opinion and Order issued March 28, 2000, petitioner is entitled to no relief from this Court and is not entitled to a CoA.

---

severity of the penalty does not itself suffice to warrant an automatic issuance of a CoA).

Accordingly, it is hereby **ORDERED** that all relief requested in petitioner's motion to alter and amend judgment, filed April 11, 2000,[5] is **DENIED**

It is so ORDERED.

SIGNED this 16th day of April, 2000.

/s/ Fred Biery
FRED BIERY
UNITED STATES DISTRICT JUDGE

---

[5] See docket entry no. 25.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MIGUEL A. RICHARDSON,	§	
	§	
Petitioner,	§	
	§	
v.	§	
	§	**CIVIL NO. SA-**
GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,	§	**98-CA-775-FB**
	§	
	§	
	§	
Respondent.	§	
	§	

MEMORANDUM OPINION AND ORDER DENYING FEDERAL HABEAS CORPUS RELIEF

After almost two decades in the state court system, petitioner Miguel A. Richardson filed this federal habeas corpus action pursuant to Title 28 U.S.C. Section 2254 challenging his September, 1981, capital murder conviction and sentence of death. As grounds for relief, petitioner presents many claims. However, for the reasons set forth at length below, the Supreme Court's holding in **Teague v. Lane**[1] precludes this Court from granting federal habeas corpus relief premised on claims petitioner presents herein. Furthermore, this Court has conducted a de novo review of all of the petitioner's claims herein and finds them to be without merit. Given the overwhelming evidence of the petitioner's guilt and the undisputed evidence of petitioner's penchant for

---

[1] 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

violent conduct even while in custody, virtually all of the petitioner's complaints herein rise no higher than that of harmless error. Therefore, this Court will deny petitioner's request for federal habeas corpus relief and deny petitioner a Certificate of Appealability.

I. Statement of the Case

A. Factual Background

A brief recitation of the facts and procedural history should help to explain why this cause first arrived on the door step of this Court more than nineteen (19) years after the petitioner committed his offense.

1. The Crime and Its Aftermath

There has never been any serious doubt that, on March 31, 1979, petitioner shot and killed two uniformed, unarmed, security guards at a Holiday Inn in San Antonio.[2]

For the purpose of this proceeding, this Court notes the evidence at the guilt-innocence phase of petitioner's 1981 trial was undisputed that (1) late on the evening of March 31, 1979, a Holiday Inn employee directed security guards John Ebbert and Howard Powers to respond to a report of a man attempting to break into a fourth floor room, (2) minutes later, hotel personnel received a call reporting gun shots, (3) less than an hour later, the lifeless bodies of the two security

---

[2] The facts of the petitioner's crime are set forth in detail in the first of three Texas Court of Criminal Appeals' published opinions affirming petitioner's conviction and sentence. See **Richardson v. State**, 744 S.W.2d 65, 71-72 (Tex. Crim. App. 1987).

guards were found in a first floor stairwell, (4) when discovered, Powers' body was handcuffed, (5) both victims had been shot at close range in the head and chest, and (6) the empty wallet of one victim was found nearby.[3]

---

[3] See Statement of Facts from Petitioner's Trial (henceforth "S.F. Trial"), Volume 4, testimony of David Raymond Snell, at pp. 35-47; and testimony of Rafael Garcia, at pp. 78-80. A hotel employee, David Raymond Snell, testified that (1) on the night in question, he received three telephone calls from the frightened guests in a fourth floor room, i.e., room number 494, complaining that someone was banging on their door trying to get into their room, (2) after the first call, it took him two or three minutes to contact Ebbert and Powers and dispatch them to the room, (3) shortly after they left the front desk area, he received the second call from the same room urging that assistance be sent, (4) he later received a third call from the same guests reporting that they had heard gun shots, and (5) when Ebbert and Powers failed to return to the lobby, he began searching for them and made his gruesome discovery of their lifeless bodies about forty-five minutes later in the first floor stair well. See S.F. Trial, Volume 4, testimony of David Raymond Snell, at pp. 39-43, 45-46, and 50-59. The first police officer at the scene, Rafael Garcia, testified that when he arrived, a desk clerk directed him to the first floor stairwell, where he discovered two "very dead" bodies that had been shot several times and displayed no vital signs, one of which had been handcuffed. See S.F. Trial, Volume 4, testimony of Rafael Garcia, at pp. 78-80. The forensic pathologist who performed the autopsies of Ebbert and Powers testified at petitioner's trial that (1) Ebbert sustained a total of three bullet wounds, two to the head and one to

It was likewise undisputed that (1) the petitioner, who had registered under an alias, and three minor females were staying in the room directly across the hall from one which made the calls for help on the night in question,[4] (2) a few

---

the chest, (2) Ebbert's head wounds consisted of entry wounds to the chin and nose which appeared to have been fired at close range, i.e., approximately three feet, (3) the bullet which entered Ebbert's face near his nose penetrated the brain and would have been instantly fatal by itself, (4) the bullet which penetrated Ebbert's chest penetrated his lung and heart and would have been instantly fatal by itself, (5) Powers, who was handcuffed, was shot in both the eye and the chest, (6) the shot that struck Powers in the eye was fired at close range, i.e., from approximately three feet, (7) the bullet that caused Powers' chest wound penetrated the heart and left lung and exited near the tip of the shoulder blade, (8) Powers' chest wound showed indications of being a loose contact wound, i.e., signs the gun muzzle was pressed against the chest when it was fired, and (9) Powers' chest wound would have been instantly fatal by itself. See S.F. Trial, Volume 4, testimony of Robert Swedarsky, at pp. 195-24.

[4] See S.F. Trial, Volume 4, testimony of Jackie Benton, at pp. 136-41; testimony of Thomas M. Wilson, at pp. 129-31; testimony of Rudy Vernon, at p. 147; testimony of James Heckman, at p. 160; and State's Trial Exhibit 16.

Hotel employee Jackie Benton identified the petitioner as the person whom she registered under the name Michael Coleman, a purported representative of a company called "On the Top in High Fashion," on March 30, 1979. **Id.**, Volume 4, at pp. 136-41. Another hotel employee, Thomas M. Wilson, furnished the business records basis

days before the incident, the petitioner bought a meal for a man named Rivers Campbell and paid Campbell one hundred dollars to purchase a .38 caliber pistol from a Galveston pawn shop,[5] (3) the particular weapon Campbell purchased for petitioner was a Titan Tiger .38 Special,[6] and (4) the weapon

---

for the admission of State's Trial Exhibit 16, the registration ticket for room 495 dated March 30, 1979. **Id.**, Volume 4, at pp. 129-31. Two San Antonio police officers who participated in the investigation of the crime each testified that room 495 was directly across the hall from room 494, the source of the excited calls for help on the night of the murders. **Id.**, Volume 4, at pp. 147 and 160. Shortly after petitioner's arrest in Colorado, a law enforcement officer executing a search warrant found a business card among petitioner's possessions bearing the company name "On the Top in High Fashion Modeling Agency For Young Women" and the name "Richardson." See S.F. Trial, Volume 5, testimony of John Dunmon, at p. 15; and State's Trial Exhibit 38.

Petitioner's companions Victoria Franklin and Rhonda Bearden both testified that petitioner checked into the Holiday Inn under the alias Michael Coleman and that petitioner sent Bearden down to the front desk the day of the murders to pose as "Mrs. Coleman." See S.F. Trial, Volume 4, testimony of Rhonda Jean Bearden, at pp. 301-03; and Volume 5, testimony of Victoria Franklin, at p. 186.

[5] See S.F. Trial, Volume 5, testimony of Rivers Campbell, at pp. 47-54.

[6] See S.F. Trial, Volume 5, testimony of Giles Bennett, at pp. 24-25.

that fired the fatal shots that struck Ebbert and Powers was an Armanius Titan Tiger .38 caliber handgun.[7]

Each of the petitioner's three female traveling companions testified that the petitioner remarked before the murders that (1) he had seen a lady's diamond ring worn by a hotel guest staying across the hall from their room, (2) he wanted to have the ring, and (3) he planned to rob the ladies staying across the hall from their room.[8] These same witnesses testified that, the day after the murders, the petitioner (1) directed one of them to tell investigating officers she knew nothing of the crime, (2) told them he had obtained over two hundred fifty dollars from his victims and displayed same to one of his companions, (3) described how the two guards had begged for their lives, (4) directed them to bring in the clothes hanging on the porch outside their room, stay in San Antonio an extra day, and leave in two separate groups, so as to avoid suspicion, and (5) directed one of them to carry his gun in her suitcase when the group departed from San Antonio.[9]

---

[7] See S.F. Trial, Volume 4, testimony of Richard Stengel, at pp. 171-76.

[8] See S.F. Trial, Volume 4, testimony of Rhonda Jean Bearden, at pp. 273-74, 285-89, and 340-42; Volume 5, testimony of Lisa Laursen, at pp. 73-74; and Volume 5, testimony of Victoria Franklin, at p. 174.

[9] See S.F. Trial, Volume 4, testimony of Rhonda Bearden, at pp. 282-85 and 289-92; Volume 5, testimony of Lisa Laursen, at pp. 76-82; and Volume 5, testimony of Victoria Franklin, at pp. 178-79, 186-89, and 192.

More specifically, the testimony at the guilt-innocence phase of trial was also clear that, in the days which followed the shooting, petitioner confessed to a sixteen-year-old prostitute with whom he was traveling named Rhonda Bearden that (1) the two security guards had caught him attempting to break into a room across the hall from where petitioner and his underage female companions were staying, (2) the two security guards accompanied him down the stairs, (3) when they reached the first floor stairwell, the petitioner drew his gun on the unarmed guards, who begged petitioner not to kill them and gave the petitioner their money, and (4) the petitioner then woke up another of his underage female companions, named Vicky Franklin, and directed her to take a towel to the first floor stairwell to wipe away any fingerprints from the door.[10]

After petitioner unsuccessfully attempted to convince the trial court that Franklin was his common law wife, Franklin testified that, (1) on the night of the murders, petitioner woke her up and told her he had killed two security guards, (2) the same night, petitioner gave her the gun and directed her to clean it and flush the shells down the toilet, (3) petitioner also directed her to take a towel, go see if the guards were dead, and wipe off the fingerprints from the door, and (4) petitioner told her he had held the two guards at gun point, they begged for their lives, he told them he would not kill them if they gave him money, he received two hundred

---

[10] See S.F. Trial, Volume 4, testimony of Rhonda Jean Bearden, at pp. 284-89 and 340-43.

fifty dollars from one guard, but shot them both when the other guard produced only two dollars.[11]

After petitioner unsuccessfully attempted to convince the trial court that a fellow Denver jail inmate named Mark Stanley Seiver was his "common law" attorney, Seiver testified the petitioner told him initially that Franklin shot the guards, but petitioner later admitted that (1) he obtained a gun from a Galveston pawn shop, (2) the two guards caught petitioner in an attempted burglary of a nearby room where several hotel guests who wore expensive jewelry were staying, (3) the guards were taking petitioner down the stairwell when petitioner produced a firearm, handcuffed one of the guards, and killed them both, and (4) he disposed of the murder weapon by throwing it into a body of water in Colorado.[12]

Shortly after the fatal shootings, petitioner and two of the three underage prostitutes, who worked for and were traveling with the petitioner, took a flight from San Antonio and reached Denver, Colorado, before they were apprehended.[13] Petitioner fought extradition for more than two years, during which time he engaged in two violent, but unsuccessful attempts to murder jail guards and escape from

---

[11] See S.F. Trial, Volume 5, testimony of Victoria Ann Franklin, at pp. 175-89 and 192.

[12] See S.F. Trial, Volume 4, testimony of Mark Stanley Seiver, at pp. 371-79.

[13] See S.F. Trial, Volume 4, testimony of Rhonda Jean Bearden, at pp. 290-96 and 308-12; Volume 5, testimony of Lisa Larsen, at pp. 74-82; Volume 5, testimony of Victoria Ann Franklin, at pp. 189-92 and 195.

custody.[14] Eventually, petitioner was returned to Texas. On May 20, 1981, a Bexar County grand jury indicted petitioner in cause no. 81-CR-1548 for intentionally and knowingly killing one of the two unarmed, hotel security guards,

---

[14] Although the following testimony was not introduced until the punishment phase of petitioner's trial, for purposes of chronological integrity, this Court notes that, while fighting extradition in Colorado, (1) on November 13, 1979, during a trip to the hospital, petitioner successfully grabbed the handgun of an accompanying officer and twice tried to pull the trigger of that weapon while it was pointed at the officer, all the while threatening the officer, but the officer managed to wedge a finger behind the trigger of the gun, see S.F. Trial, Volume 6, testimony of Joe Sanger, at pp. 37-44; (2) on April 20, 1980, petitioner grabbed a fire extinguisher off the wall and attempted to strike a detention officer with same, see S.F. Trial, Volume 6, testimony of Ralph Vickrey, at pp. 16-18 and 31; (3) during his detention pending extradition, petitioner repeatedly threatened jail personnel and specially stated that if he were ever released, he would kill every one of the guards with whom he had contact, see S.F. Trial, Volume 6, testimony of Ralph Vickrey, at pp. 31-32; (4) on June 19, 1980, during another trip to the hospital, petitioner produced a homemade shank and stabbed an accompanying officer in the neck deep enough to penetrate to the spine, see S.F. Trial, Volume 6, testimony of Kenneth Hall, at pp. 71-77.

i.e., John G. Ebbert, in the course of committing or attempting to commit the robbery of Ebbert.[15]

On September 16, 1981, a Bexar County jury convicted petitioner of capital murder.[16] Two days later, that same jury affirmatively answered the two Texas capital sentencing special issues submitted to them and the trial court imposed a sentence of death upon petitioner.[17] On November 24, 1981, the trial court held an evidentiary hearing and denied petitioner's motion for new trial.[18]

2. Direct Appeals

On October 28, 1987, the Texas Court of Criminal Appeals affirmed petitioner's conviction and sentence.[19] On July 2, 1989, however, the United States Supreme Court vacated petitioner's conviction and sentence and remanded the case to the Texas Court of Criminal Appeals for further

---

[15] See Transcript of pleadings, motions, and other documents filed in petitioner's state trial court proceeding (henceforth "Transcript"), at p. 8.

[16] See Transcript, at pp. 198-200; and S.F. Trial, Volume 5, at pp. 247-49.

[17] See Transcript, at p. 223; and S.F. Trial, Volume 6, at pp. 315-17 and 319-21.

[18] See S.F. Trial, Volume 6, at pp. 322-49.

[19] See **Richardson v. State**, 744 S.W.2d 65 (Tex. Crim. App. 1987), **vacated**, 492 U.S. 914 (1989).

consideration in light of the Supreme Court's then-recent opinion in **Penry v. Lynaugh**.[20]

In a second opinion issued June 12, 1991, the Texas Court of Criminal Appeals again affirmed petitioner's conviction and sentence, holding petitioner's evidence of his good deeds, good character traits, and "deprived" childhood did not fall within the scope of the Supreme Court's holding in **Penry**.[21] On June 28, 1993, the United States Supreme Court again vacated petitioner's conviction and remanded the case to the Texas Court of Criminal Appeals for further consideration in light of its then-recent opinion in **Johnson v. Texas**.[22]

On June 1, 1994, the Texas Court of Criminal Appeals affirmed petitioner's conviction and sentence for a third time, once again holding the evidence petitioner presented at his 1981 trial did not fall within the parameters of the Supreme Court's narrow holding in **Penry**.[23] On June 26, 1995, the Supreme Court denied petitioner's third certiorari petition.[24]

3. State Habeas Corpus Proceeding

---

[20] See **Richardson v. Texas**, 492 U.S. 914 (1989).

[21] See **Richardson v. State**, 886 S.W.2d 769, 771-76 (Tex. Crim. App. 1991), **vacated**, 509 U.S. 917 (1993).

[22] See **Richardson v. Texas**, 509 U.S. 917 (1993).

[23] See **Richardson v. State**, 901 S.W.2d 941 (Tex. Crim. App. 1994), **cert. denied**, 515 U.S. 1162 (1995).

[24] See **Richardson v. Texas**, 515 U.S. 1162 (1995).

On December 17, 1996, petitioner filed a state habeas corpus application in which he presented some fifteen grounds for relief.[25]

As grounds for relief, in his application, petitioner argued that (1) the state trial court erroneously excluded a **Witherspoon** qualified juror, (2) the trial court erroneously admitted evidence of petitioner's conviction while still a juvenile under the now-defunct Federal Youth Corrections Act, (3) petitioner's 1981 jury was unable to give mitigating effect to petitioner's evidence of his good character traits, "deprived" family background, and mental impairment, (4) the trial court erroneously admitted testimony of the prosecution's expert psychologist, (5) the Texas scheme of lethal injection as the method of execution does not minimize risks of unnecessary infliction of pain and suffering, (6) petitioner's stay of fifteen years on death row is itself a violation of the Eighth Amendment's prohibition against cruel and unusual punishment, (7) the trial court erred in failing to instruct the jury at the punishment phase of petitioner's trial that petitioner could be eligible for release on parole in as few as twenty years, (8) the trial court erred in admitting evidence allegedly seized illegally in Colorado, (9) the trial court improperly limited the cross-examination of prosecution witnesses, (10) the trial court permitted petitioner to be shackled during trial, (11) the trial court erroneously permitted the introduction of inflammatory evidence, (12) Article 37.071(g) of the Texas Code of Criminal Procedure, as applied to petitioner's case, prevented

---

[25] A copy of petitioner's 129-page state habeas corpus application appears among the voluminous state court records from petitioner's state habeas corpus proceeding in Volume One.

petitioner's jury from understanding its role, (13) the jury instructions erroneously defined the culpable mental state necessary for a capital murder conviction under Texas law, (14) petitioner's trial and appellate counsel rendered ineffective assistance, and (15) the cumulative effect of the foregoing errors warrants granting petitioner a new trial, vacating his death sentence, or both.

The state trial court held an extensive evidentiary hearing on petitioner's state habeas claims, commencing on April 29, 1997, and finally concluding on July 1, 1997.[26]

In an Order issued October 1, 1997, the state trial court concluded several of petitioner's claims for state habeas relief had already been decided adversely to petitioner in the course of petitioner's direct appeal, found no evidence the method of execution employed by the State of Texas actually causes unnecessary pain, found any delay in petitioner's execution was the result of the petitioner's own efforts to seek review of his conviction and sentence, and concluded all of the petitioner's claims for relief were without merit, and recommended denial of petitioner's state habeas corpus application.[27]

---

[26] The verbatim transcription or Statement of Facts from petitioner's state habeas corpus evidentiary hearing (henceforth "State Habeas Hearing") appears as Volumes III of VIII through VII-A of VIII among the state court records relating to petitioner's state habeas corpus proceeding.

[27] A copy of the state trial court's Order of October 1, 1997, appears at the front of VOLUME FOUR of the pleadings relating to petitioner's state habeas corpus proceeding herein. Unfortunately, the copy of that volume which this

In an unpublished, per curiam, Order issued June 10, 1998, the Texas Court of Criminal Appeals found the state trial court's findings of fact and conclusions of law were fully supported by the record and denied state habeas corpus relief.[28]

B. Procedural History

On August 28, 1998, petitioner filed a motion for stay of execution in this Court and a motion requesting appointment of counsel.[29] In an Order issued August 31, 1998, this Court stayed petitioner's execution, appointed counsel to represent petitioner, and set deadlines for the filing of petitioner's federal habeas corpus petition and the response thereto.[30]

On October 8, 1998, petitioner filed a federal habeas corpus petition in which he argued (1) the state trial court erred in refusing to instruct the jury at the punishment phase of petitioner's trial that petitioner could be eligible for parole in as few as twenty years, (2) the Texas capital sentencing scheme in existence as of 1981 had a chilling effect on the ability of petitioner's trial counsel to introduce "mitigating" evidence of petitioner's antisocial personality syndrome and the history of physical and sexual abuse petitioner had

---

Court received from the respondent does not bear any page numbers.

[28] See **Ex parte Miguel A. Richardson**, Writ No. 29, 821-02 (Tex. Crim. App. June 10, 1998).

[29] See docket entry nos. 1 and 5.

[30] See docket entry no. 7.

experienced as a child, (3) the trial court erred in excluding on its own motion a potential juror who was qualified under ***Witherspoon***, (4) the method of lethal injection employed in Texas does not adequately reduce the risk of extreme pain and suffering during execution, (5) petitioner's trial counsel rendered ineffective assistance, (6) the trial court erroneously admitted evidence of petitioner's conviction under the Federal Youth Corrections Act, (7) the seventeen-year delay since petitioner's conviction renders petitioner's execution at this date a violation of constitutional and international law, (8) application of Texas' twelve/ten rule violated petitioner's constitutional rights, (9) the trial court erred in admitting evidence of victim impact and petitioner's extraneous criminal conduct, (10) the trial court erroneously limited cross-examination of prosecution witnesses, and (11) the cumulative effect of the foregoing errors warrant federal habeas corpus relief.[31] On December 10, 1998, petitioner filed an amended federal habeas corpus petition which asserted essentially the same claims as his original petition.[32]

On January 13, 1999, respondent filed an answer and motion for summary judgment in which he asserted petitioner's claims herein are either foreclosed by the Supreme Court's holding in **Teague**, assertions of harmless error, or simply without merit.[33]

On March 8, 1999, petitioner filed a pleading in which he urged this Court to disregard the Antiterrorism and

---

[31] See docket entry no. 9.

[32] See docket entry no. 15.

[33] See docket entry no. 16.

Effective Death Penalty Act of 1996 ["AEDPA"][34] and conduct a de novo review of each of the petitioner's claims for relief herein and argued this Court should hold a new evidentiary hearing because the petitioner's extensive state habeas corpus proceedings were a "sham."[35]

II. Standard of Review

A. Antiterrorism and Effective Death Penalty Act of 1996

On April 24, 1996, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 ["AEDPA"],[36] which radically altered the standard of review by this Court in federal habeas corpus proceedings filed by state prisoners pursuant to Title 28 U.S.C. Section 2254.[37]

---

[34] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[35] See docket entry no. 19.

[36] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[37] See **Nobles v. Johnson**, 127 F.3d 409, 412-15 (5th Cir. 1997), **cert. denied**, 523 U.S. 1139 (1998); **Hernandez v. Johnson**, 108 F.3d 554,557 n.2 (5th Cir.), **cert. denied**, 522 U.S. 984 (1997); **Brown v. Cain**, 104 F.3d 744, 748-49 (5th Cir.), **cert. denied**, 520 U.S. 1195 (1997); **Childress v. Johnson**, 103 F.3d 1221, 1224 (5th Cir. 1997); **Mata v. Johnson**, 99 F.3d 1261, 1265-66 (5th Cir. 1996), **vacated in part and modified on other grounds**, 105 F.3d 209 (5th Cir. 1997); **Herman v. Johnson**, 98 F.3d 171, 173 (5th Cir. 1996), **cert. denied**, 520 U.S. 1123 (1997); **Drinkard v. Johnson**, 97 F.3d 751, 756 (5th Cir. 1996), **cert. denied**, 520 U.S. 1107 (1997).

Prior to the Supreme Court's recent opinion in **Lindh v. Murphy**,[38] the Fifth Circuit had held in several opinions that the new standard of review provisions of the AEDPA governed federal court review of all federal habeas corpus petitions filed by state prisoners, including those petitions pending as of the effective date of that enactment.[39] However, the holding in **Lindh** limits the applicability of the AEDPA's new standard of review provisions to those petitions filed after the effective date of that enactment, i.e., after April 24, 1996.[40] This aspect of the holding in **Lindh** does not apply to

---

38 521 U.S. 320, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997).

39 See **Carter v. Johnson**, 110 F.3d 1098, 1103 (5th Cir.), **vacated** 522 U.S. 964 (1997); **Hernandez v. Johnson**, 108 F.3d at 557-58; **Brown v. Cain**, 104 F.3d at 748-49; **Lockhart v. Johnson**, 104 F.3d 54, 56-57 (5th Cir.), **cert. denied**, 521 U.S. 1123 (1997); **Childress v. Johnson**, 103 F.3d at 1224; **Mata v. Johnson**, 99 F.3d at 1266; **Drinkard v. Johnson**,97 F.3d at 767.

40 See **Corwin v. Johnson**, 150 F.3d 467, 471 (5th Cir. 1998), **cert. denied**, 119 S. Ct. 613 (1998) (holding that the AEDPA applies to all federal habeas corpus petitions filed after the effective date of that enactment, i.e., April 24, 1996); **Hogue v. Johnson**, 131 F.3d 466, 469 n.l (5th Cir. 1997), **cert. denied**, 523 U.S. 1014 (1998); **Carter v. Johnson**, 131 F.3d 452, 457 (5th Cir. 1997), **cert. denied**, 523 U.S. 1099 (1998); **Nobles v. Johnson**, 127 F.3d at 413-15 (holding that a federal habeas petition filed after the effective date of the AEDPA was governed by the standard of review set forth in the AEDPA despite the fact petitioner had filed other motions in that cause prior to April 24, 1996).

this cause because petitioner filed this federal habeas corpus action after the effective date of the AEDPA.[41]

Under the AEDPA's new standard of review, this Court cannot grant petitioner federal habeas corpus relief in this cause in connection with any claim which was adjudicated on the merits in state court proceedings unless the adjudication of that claim either (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or (2) resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.[42] A

---

[41] See **Robison v. Johnson**, 151 F.3d 256, 258 n.2 (5th Cir. 1998), **cert. denied**, 119 S. Ct. 1578 (1999) (holding that the critical date for determining the applicability of the AEDPA is the date the petitioner filed his federal habeas corpus petition); **Corwin v. Johnson**, 150 F.3d at 471; **Nobles v. Johnson**, 127 F.3d at 413-15.

[42] See **Miller v. Johnson**, 200 F.3d 274, 281 (5th Cir. 2000) (recognizing that under the AEDPA, an application of law to facts is unreasonable only when reasonable jurists considering the question would be of one view that the state court ruling was incorrect, i.e., only if the state court decision was so clearly incorrect that it would not be debatable among reasonable jurists); **Jones v. Jones**, 163 F.3d 285, 299 (5th Cir. 1998), **cert. denied**, 120 S. Ct. 224 (1999); **Davis v. Johnson**, 158 F.3d 806, 812 (5th Cir. 1998), **cert. denied**, 119 S. Ct. 1474 (1999); **Robison v. Johnson**, 151 F.3d at 265-66 (holding that an application of federal law is "unreasonable" only if it is so clearly incorrect that it would not be debatable among reasonable jurists; in other words, an application of law to facts is

reasonable, good faith application of Supreme Court precedent will immunize the state court conviction from federal habeas reversal, even if federal courts later reject that

---

unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect); **Corwin v. Johnson**, 150 F.3d at 471-72 (holding that pure questions of law and mixed questions of law and fact are reviewed under § 2254(d)(1) and questions of fact are reviewed under § 2254(d)(2) and that an application of law to facts is unreasonable only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect); **Nobles v. Johnson**, 127 F.3d at 416 (holding that the unreasonable application standard requires more than mere disagreement with the state court decision, rather, the petitioner must show that the state court decision is so clearly incorrect that it would not be debatable among reasonable jurists); **Williams v. Cain**, 125 F.3d 269, 276-77 (5th Cir. 1997), **cert. denied**, 119 S. Ct. 144 (1998); **Hernandez v. Johnson**, 108 F.3d at 557 n.2; **Brown v. Cain**, 104 F.3d at 748-49; **Lockhart v. Johnson**, 104 F.3d at 56-57; **Childress v. Johnson**, 103 F.3d at 1224; **Mata v. Johnson**, 99 F.3d at 1267; **Drinkard v. Johnson**, 97 F.3d at 767-69.

Pursuant to the AEDPA, in this Circuit, pure questions of law are reviewed under the "contrary to" standard; mixed questions of law and fact are reviewed under the "unreasonable application" standard; and pure questions of fact are reviewed under the "unreasonable determination of the facts" standard. **Lamb v. Johnson**, 179 F.3d 352, 356 (5th Cir.), **cert. denied**, 120 S. Ct. 522 (1999); **Drinkard v. Johnson**, 97 F.3d at 767-69.

view of the applicable precedent.[43] In federal habeas corpus proceedings, a resolution or adjudication "on the merits" is a term of art that refers to whether a court's disposition of the claim was substantive, as opposed to procedural.[44] The AEDPA also significantly restricts the scope of federal habeas review of state court fact findings[45] and limits the

---

[43] See **Miller v. Johnson**, 200 F.3d at 281; **Robison v. Johnson**, 151 F.3d at 266; **Corwin v. Johnson**, 150 F.3d at 471-72; **Nobles v. Johnson**, 127 F.3d at 416; **Williams v. Cain**, 125 F.3d at 277; **Mata v. Johnson**, 99 F.3d at 1268; **Drinkard v. Johnson**, 97 F.3d at 769.

[44] See **Miller v. Johnson**, 200 F.3d at 281; **Green v. Johnson**, 116 F.3d 1115, 1121 (5th Cir. 1997).

[45] See **Miller v. Johnson**, 200 F.3d at 281 (state court fact findings are presumed correct and the petitioner has the burden of rebutting the presumption by clear and convincing evidence); **Hicks v. Johnson**, 186 F.3d 634, 637 (5th Cir. 1999), **cert. denied**, 120 S. Ct. 976 (2000)(holding the AEDPA requires federal habeas courts to accept as correct state court factual determinations unless the petitioner rebuts same by clear and convincing evidence); **Williams v. Cain**, 125 F.3d at 277 (recognizing that under the AEDPA, state court factual findings "shall be presumed correct unless rebutted by 'clear and convincing evidence'"); **Hernandez v. Johnson**, 108 F.3d at 558 & n.4 (holding that under the AEDPA, the proper forum for the making of all factual determinations in habeas cases will shift to the state courts "where it belongs" and recognizing that the AEDPA clearly places the burden on the federal habeas petitioner "to raise and litigate as fully as possible his potential federal claims in state court"); 28 U.S.C. § 2254(e)(1).

circumstances in which a habeas corpus petitioner can obtain an evidentiary hearing in federal court.[46]

In the course of petitioner's state habeas corpus proceeding, the state court expressly rejected all claims petitioner has presented to this Court. However, in so doing, the Texas Court of Criminal Appeals relied upon findings of fact and conclusions of law which dismissed many of the petitioner's claims on the ground the same arguments had been rejected during the course of petitioner's direct appeal. In denying petitioner's state habeas corpus application, the Texas Court of Criminal Appeals did rely upon state trial court findings of fact and conclusions of law that addressed the merits of some of the same claims petitioner presents to this Court.

The AEDPA places great value upon the factual findings and conclusions of law made by state courts in the course of petitioner's state habeas corpus proceedings. Under the AEDPA, because the state habeas court rejected on the merits some of the petitioner's federal claims, this Court is virtually bound by the state court rulings on those issues unless the petitioner can satisfy the standard outlined above by showing the state court's holdings were based upon either an unreasonable application of clearly established federal law or an unreasonable determination of the facts from the evidence before that court. An application of federal law is unreasonable when reasonable jurists considering the issue would be of one view that the state court ruling was incorrect,

---

[46] See **Clark v. Johnson**, 202 F.3d 760, 765 (5th Cir. 2000); **Robison v. Johnson**, 151 F.3d at 269; **McDonald v. Johnson**, 139 F.3d 1056, 1059 (5th Cir. 1998); 28 U.S.C. § 2254(e)(2).

i.e., the state court's decision is so clearly incorrect that it would not be debatable among reasonable jurists.[47] Under the AEDPA, any state court factual determination must be presumed correct unless rebutted by clear and convincing evidence.[48]

Although logic would seem to favor respondent's position, it is unclear at this juncture whether the Supreme Court or the Fifth Circuit is prepared to adopt a rule in which a state habeas court's rejection of a federal claim on the ground the same claim was rejected on the merits during the course of the prisoner's direct appeal constitutes a ruling "on the merits" for purposes of the highly deferential standard of review mandated by the AEDPA. By analogy, the Fifth Circuit's practice of "looking through" a summary denial of state habeas corpus relief by the Texas Court of Criminal Appeals to a Texas trial court's findings of fact and conclusions of law would appear to support a practice of "looking through" a summary rejection of a state habeas claim to the previous state appellate court opinion rejecting that same claim on the merits. However, the Fifth Circuit has not yet specifically approved such a practice.

---

[47] See **Miller v. Johnson**, 200 F.3d at 281; **Morris v. Cain**, 186 F.3d 581, 583 (5th Cir. 1999); **Lamb v. Johnson**, 179 F.3d at 356; **Jones v. Jones**, 163 F.3d at 299; **Davis v. Johnson**, 158 F.3d at 812; **Corwin v. Johnson**, 150 F.3d at 471-72; **Drinkard v. Johnson**, 97 F.3d at 769.

[48] See **Morris v. Cain**, 186 F.3d at 583; **Davis v. Johnson**, 158 F.3d at 812; **Jackson v. Johnson**, 150 F.3d 520, 524 (5th Cir. 1998), **cert. denied**, 119 S. Ct. 1339 (1999); 28 U.S.C. § 2254(e)(1).

Furthermore, petitioner contends the Fifth Circuit's transformation of the AEDPA's standard of review provisions into little more than a rubber stamp, in a manner similar to the Fourth Circuit's interpretation of the AEDPA currently under scrutiny by the United States Supreme Court, is inconsistent with both common sense and the constitutional limitations on the authority of Congress to limit the scope of federal habeas corpus review.

Under such circumstances, this Court believes the best approach to analyzing petitioner's claims herein is to conduct both conduct a de novo review of same, as well as apply the AEDPA standard of review. Under either standard, petitioner's claims warrant neither a Certificate of Appealability nor an evidentiary hearing nor federal habeas corpus relief.

B. State Law Issues in Federal Habeas Corpus Proceedings

A state prisoner seeking federal court review of his conviction pursuant to Title 28 U.S.C. Section 2254 must assert a violation of a federal constitutional right.[49] Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also presented.[50] In the course of reviewing state

---

[49] **Lawrence v. Lensing**, 42 F.3d 255, 258 (5th Cir. 1994); **Gray v. Lynn**, 6 F.3d 265, 268 (5th Cir. 1993); **Lowery v. Collins**, 988 F.2d 1364, 1367 (5th Cir. 1993).

[50] See **Estelle v. McGuire**, 502 U.S. 62, 67-68 (1991); **Lewis v. Jeffers**, 497 U.S. 764, 780 (1990); **Pulley v. Harris**, 465 U.S. 37, 41 (1984); **Green v. Johnson**, 160 F.3d 1029, 1035 (5th Cir. 1998), **cert. denied**, 525 U.S. 1174 (1999); **Hallmark v. Johnson**, 118 F.3d 1073, 1080

criminal convictions in federal habeas corpus proceedings, a federal court does not sit as a super-state appellate court.[51] The question before a federal habeas corpus court is not whether the state court correctly applied its own interpretation of state law; rather, the question is whether petitioner's federal constitutional rights were violated.[52]

(5th Cir.), **cert. denied sub nom. Johnson v. Monroe**, 522 U.S. 1003 (1997); **West v. Johnson**, 92 F.3d 1385, 1404 (5th Cir. 1996), **cert. denied**, 520 U.S. 1242 (1997); **Pemberton v. Collins**, 991 F.2d 1218, 1223 (5th Cir.), **cert. denied** 510 U.S. 1025 (1993); **Lavernia v. Lynaugh**, 845 F.2d 493, 496 (5th Cir. 1988); **Rault v. Butler**, 826 F.2d 299, 302 n.l (5th Cir.), pert. denied, 483 U.S. 1042 (1987); **Neyland v. Blackburn**, 785 F.2d 1283, 1293 (5th Cir.), **cert. denied**, 479 U.S. 930 (1986).

[51] **Dickerson v. Guste**, 932 F.2d 1142, 1145 (5th Cir.), **cert. denied**, 502 U.S. 875 (1991). "[F]ederal courts do not sit as courts of appeal and error for state court convictions." **Dillard v. Blackburn**, 780 F.2d 509, 513 (5th Cir. 1986). Accord **Bridge v. Lynaugh**, 838 F.2d 770, 772 (5th Cir. 1988). This Court does not review a state prisoner's federal habeas corpus petition to determine whether the state appellate courts correctly construed and applied state law. Federal habeas corpus relief does not lie for errors of state law. See **Estelle v. McGuire**, 502 U.S. at 67-68; **Lewis v. Jeffers**, 497 U.S. at 780; **Pulley v. Harris**, 465 U.S. at 41; **Pemberton v. Collins**, 991 F.2d at 1223; **Lavernia v. Lynaugh**, 845 F.2d at 496; **Rault v. Butler**, 826 F.2d at 302 n.l; **Neyland v. Blackburn**, 785 F.2d at 1293.

[52] See **Neyland v. Blackburn**, 785 F.2d at 1289.

> When a federal district court reviews a state prisoner's habeas petition pursuant to 28 U.S.C. § 2254 it must decide whether the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." The court does not review a judgment, but the lawfulness of the petitioner's custody simpliciter.[53]

Thus, the issue before this Court is not whether the Texas courts properly applied state law principles during petitioner's trial or when they affirmed petitioner's conviction and sentence or denied petitioner's state habeas corpus application, but whether petitioner's federal constitutional rights have been violated.

Therefore, insofar as petitioner argues his state statutory or state constitutional rights were violated, independently of any federal constitutional violation, his arguments do not furnish an arguable basis for federal habeas corpus relief.

C. Non-Retroactivity Doctrine of **Teague v. Lane**

Under the Supreme Court's holding in **Teague v. Lane**, federal courts are generally barred from applying new constitutional rules of criminal procedure retroactively on collateral review.[54] A "new rule" is one which was not

---

[53] **Coleman v. Thompson**, 501 U.S. 722, 730(1991).

[54] See **Teague v. Lane**, 489 U.S. 288, 310 (1989); **Caspari v. Bohlen**, 510 U.S. 383, 389-90 (1994); **Matthew v. Johnson**, 201 F.3d 353, 359 (5th Cir. 2000); **Johnson v. Puckett**, 176 F.3d 809, 819 (5th Cir. 1999); **Vega v. Johnson**, 149 F.3d 354, 357 (5th Cir. 1998), **cert.**

dictated by precedent existing at the time defendant's conviction became final.[55] Under this doctrine, unless reasonable jurists hearing defendant's claim at the time his

---

denied, 525 U.S. 1119 (1999); **Johnson v. Scott**, 68 F.3d 106, 111 n.10 (5th Cir. 1995), **cert. denied**, 517 U.S. 1122 (1996); **Lackey v. Scott**, 52 F.3d 98, 100 (5th Cir. 1995), **stay granted and cert. dismissed**, 514 U.S. 1093 (1995); **Davis v. Scott**, 51 F.3d 457, 466-67 (5th Cir.), **cert. denied**, 516 U.S. 992 (1995); **Mann v. Scott**, 41 F.3d 968, 976 (5th Cir. 1994), **cert. denied**, 514 U.S. 1117 (1995); **Crank v. Collins**, 19 F.3d 172, 175 (5th Cir. 1994), **cert. denied**, 512 U.S. 1214 (1994); **Motley v. Collins**, 18 F.3d 1223, 1230 (5th Cir.), **cert. denied**, 513 U.S. 960 (1994).

[55] See **O'Dell v. Netherland**, 521 U.S. 151, 156 (1997)(holding that a "new rule" either "breaks new ground," "imposes a new obligation on the States or the Federal Government," or was not "dictated by precedent existing at the time the defendant's conviction became final"); **Caspari v. Bohlen**, 510 U.S. at 390; **Matthew v. Johnson**, 201 F.3d at 359 (holding that the inquiry is whether a state court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule the defendants sought was required by the Constitution); **Vega v. Johnson**, 149 F.3d at 357; **Lucas v. Johnson**, 132 F.3d 1069, 1080-81 n.7 (5th Cir.), **cert. dismissed**, 524 U.S. 965 (1998); **White v. Johnson**, 79 F.3d 432, 437-38 (5th Cir.), **cert. denied**, 519 U.S. 911 (1996); **Davis v. Scott**, 51 F.3d at 459-60; **Mann v. Scott**, 41 F.3d at 976; **Crank v. Collins**, 19 F.3d at 175; **Motley v. Collins**, 18 F.3d at 1230.

conviction became final would have felt compelled by existing precedent to rule in his favor, a federal habeas court is barred from doing so on collateral review.[56] This non-retroactivity doctrine applies equally to a novel application of an old rule.[57] The only two exceptions to the **Teague** non-retroactivity doctrine are reserved for (1) new rules forbidding criminal punishment of certain primary conduct and rules prohibiting a certain category of punishment for a class of defendants because of their status or offense and (2) "watershed" rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding, i.e., a small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty.[58] A conviction becomes final for **Teague** purposes when either the United States Supreme Court denies a certiorari petition on the defendant's direct appeal or the time period for filing a certiorari petition expires.[59] Petitioner's

---

[56] **Id.**

[57] See **Stringer v. Black**, 503 U.S. 222, 227-29 (1992); **Butler v. McKellar**, 494 U.S. 407, 414-15 (1990); **West v. Johnson**, 92 F.3d 1385, 1399 (5th Cir. 1996), **cert. denied**, 520 U.S. 1242 (1997); **Lackey v. Scott**, 52 F.3d at 100.

[58] See **O'Dell v. Netherland**, 521 U.S. at 157; **Graham v. Collins**, 506 U.S. 461, 478 (1993); **Matthew v. Johnson**, 201 F.3d at 369; **Muniz v. Johnson**, 132 F.3d 214, 225 (5th Cir.), **cert. denied**, 523 U.S. 1113 (1998); **Brown v. Cain**, 104 F.3d 744, 752 (5th Cir.), **cert. denied**, 520 U.S. 1195 (1997).

[59] See **Caspari v. Bohlen**, 510 U.S. at 390; **Ott v. Johnson**, 192 F.3d 510, 513 (5th Cir. 1999); **Felder v. Johnson**,

conviction became final on July 5, 1995, i.e., the date the United States Supreme Court denied petitioner's third certiorari petition.

D. Harmless Error Analysis

The test for harmless error in a federal habeas corpus action brought by a state prisoner is "whether the error had substantial and injurious effect or influence in determining the jury's verdict."[60]

---

180 F.3d 206, 210 (5th Cir.), **cert. denied**, 120 S. Ct. 630 (1999); **Goodwin v. Johnson**, 132 F.3d 162, 179 n.13 (5th Cir. 1998); **Nichols v. Scott**, 69 F.3d 1255, 1264 (5th Cir. 1995), **cert. denied**, 518 U.S. 1022 (1996).

[60] See **Brecht v. Abrahamson**, 507 U.S. 619, 637 (1993); **Mayabb v. Johnson**, 168 F.3d 863, 868 (5th Cir.), **cert. denied**, 120 S. Ct. 409 (1999); **Goodwin v. Johnson**, 132 F.3d 162, 181 (5th Cir. 1997); **Woods v. Johnson**, 75 F.3d 1017, 1026 (5th Cir.), **cert. denied**, 519 U.S. 854 (1996) (holding that to satisfy the harmless error standard announced in **Brecht**, the defendant must show that there is more than a mere reasonable possibility that the error contributed to the verdict); **Cupit v. Whitley**, 28 F.3d 532, 538-59 (5th Cir. 1994), **cert. denied**, 513 U.S. 1163 (1995)(discussing the difference, for purposes of harmless error analysis, between structural and mere trial errors); **Ward v. Whitley**, 21 F.3d 1355, 1365 (5th Cir. 1994), **cert. denied**, 513 U.S. 1192 (1995); **Vanderbilt v. Collins**, 994 F.2d 189, 199 (5th Cir. 1993). However, the **Brecht** harmless error standard does not require that for the error to be harmful that there be a reasonable probability the result would have been different. See **Woods v. Johnson**, 75 F.3d at 1027 (citing **Kyles v.**

III. Analysis of the Claims

A. Failure to Instruct on Parole Eligibility

1. The Claim

In his first claims for relief, petitioner herein argues his constitutional rights under **Simmons v. South Carolina** were violated when the Texas trial court refused to instruct the jury at the punishment phase of petitioner's trial that, if given a life sentence, the petitioner would be eligible for release on parole in only twenty years.[61]

2. De Novo Review

a. No Merit

The Fifth Circuit has repeatedly rejected both due process and Eighth Amendment challenges to the refusal of Texas trial courts to instruct capital sentencing juries on the highly speculative impact of Texas parole law on a life sentence imposed on a criminal defendant convicted of capital

---

Whitley, 514 U.S. 419, 434-36 (1995)). Likewise, if the court finds that the evidence on the question of the harmlessness of the error is evenly balanced, federal habeas relief must be granted. See **Woods v. Johnson**, 75 F.3d at 1026 (citing **O'Neal v. McAninch**, 513 U.S. 432, 436 (1995)).

[61] See Petitioner's Amended Petition, filed December 10, 1998, docket entry no. 15 (henceforth "Amended Petition"), at pp. 14-25; and Petitioner's Reply Memorandum, filed March 8, 1999, docket entry no. 19 (henceforth "Reply Memorandum"), at pp. 6-8.

murder.[62] There is no federal constitutional right to an instruction informing the jury regarding the possible impact of Texas parole law on a criminal defendant sentenced to serve a term of life imprisonment or inviting the jury to engage in speculation on such matters.[63] Neither petitioner's Fifth Amendment due process rights nor his Eighth Amendment rights were violated by the refusal of the Texas trial court to instruct his jury on Texas parole law.

b. **Teague** Foreclosure

Furthermore, application of the rule in **Simmons** to a jurisdiction such as Texas, when the Supreme Court specifically distinguished the Texas capital sentencing scheme in its opinion in **Simmons**, would extend the holding in **Simmons** far beyond the circumstances of that case as to violate the non-retroactivity doctrine of **Teague** because it would amount to the adoption in this federal habeas corpus proceeding of a "new rule" of constitutional procedure.[64]

---

[62] See **Miller v. Johnson**, 200 F.3d 274, 290-91 (5th Cir. 2000); **Green v. Johnson**, 160 F.3d at 1044-45; **Muniz v. Johnson**, 132 F.3d at 224-25; **Johnson v. Scott**, 68 F.3d 106, 111-12 (5th Cir. 1995), **cert. denied**, 517 U.S. 1122 (1996); **Knox v. Collins**, 928 F.2d 657, 660 (5th Cir. 1991), **cert. denied**, 510 U.S. 1061 (1994); **Andrade v. McCotter**, 805 F.2d 1190, 1192 (5th Cir. 1986).

[63] **Id.**

[64] See **Green v. Johnson**, 160 F.3d at 1045 & n.16; **Muniz v. Johnson**, 132 F.3d at 224-25; **Johnson v. Scott**, 68 F.3d at 112 n.12. While petitioner's conviction became final for **Teague** purposes after the date of the Supreme Court's opinion in **Simmons**, as explained above, the

c. Harmless Error

Finally, any trial court error in failing to instruct petitioner's jury on Texas parole law at the punishment phase of petitioner's 1981 capital murder trial was harmless. At the time of his trial, petitioner was only 27 years of age. Petitioner argues that, under Texas parole law applicable to his capital offense, had he received a life sentence, he would have been eligible for release on parole not earlier than twenty years.[65]

In addition to the compelling evidence regarding petitioner's offense introduced at the guilt-innocence phase of petitioner's 1981 trial outlined above, petitioner's companion Rhonda Jean Bearden testified that, while watching a television news report on the murders in San Antonio, petitioner remarked that whoever had done the crime was "a

---

opinion in **Simmons** specifically excepted jurisdictions such as Texas from the rule announced in that case. Extending **Simmons** to Texas would, therefore, constitute adoption of a "new rule" for **Teague** purposes. **See Green v. Johnson**, 160 F.3d at 1045 & n.16; **Muniz v. Johnson**, 132 F.3d at 224-25.

[65] At the time of both petitioner's offense and trial, Texas law provided that a criminal defendant convicted of capital murder and sentenced to death was not eligible for release on parole and that a defendant convicted of capital murder and sentenced to a term of imprisonment had to serve the lesser of either one third of his maximum sentence or twenty years before becoming eligible for release on parole. See *former* Article 42.12, § 15(b), TEX. CODE CRIM. PROC. ANN. (Vernon 1979).

cold blooded motherfucker" and then laughed.[66] Victoria Franklin, another of petitioner's female companions, testified petitioner showed no remorse when he described to her the details of his offense and corroborated Bearden's account of petitioner's response to the television news reports of the murders.[67]

At the punishment phase of petitioner's trial, there was considerable testimony regarding petitioner's post-arrest conduct. A jail guard named Joe Sawyer testified that on November 13, 1979, while he and another officer were attempting to return the petitioner to the jail from the hospital (1) petitioner went for Sawyer's gun and managed to get control of the gun, (2) during the struggle over the gun, petitioner twice pointed the gun at Sawyer and said "You may as well give up because I have the hammer back and I have control," (3) petitioner twice tried to pull the trigger of the revolver while it was pointed at Sawyer but Sawyer had his finger lodged behind the trigger, (4) both during and after the struggle over the gun, the petitioner also told Sawyer "I'll kill any white motherfucker, especially any cop that gets in my way," (5) Sawyer eventually regained control of the gun, but (6) as a result of the struggle, Sawyer sustained a torn rotator cuff in his right shoulder.[68] Ralph Vickrey, a Denver Colorado Deputy Sheriff testified that (1) in April 20, 1980, while awaiting extradition to Texas, petitioner seized a fire

---

[66] See S.F. Trial, Volume 4, testimony of Rhonda Jean Bearden, at pp. 279-80.

[67] See S.F. Trial, Volume 5, testimony of Victoria Franklin, at pp. 180, 185, and 192.

[68] See S.F. Trial, Volume 6, testimony of Joe Sawyer, at pp. 37-43.

extinguisher from the wall and attempted to strike a jail officer with same, (2) several guards attempted to restrain petitioner, (3) in the ensuing melee, petitioner was maced, one guard was struck in the face, and several other guards sustained minor cuts, (4) guards carried petitioner back to his cell and, as soon as they released petitioner, he struck a guard and said "If I ever get on the street, I'll get everyone of you," and (5) on another occasion, the petitioner told him that if he ever saw light, he would hurt someone to get out.[69] A hospital guard named Kenneth Hall testified that on June 19, 1980, he took petitioner to the hospital surgical clinic where (1) petitioner suddenly and without warning, produced a homemade weapon from the groin area, (2) petitioner stabbed Hall in the neck with sufficient force to penetrate all the way to Hall's spine, (3) Hall pushed petitioner away but petitioner approached Hall a second time, (4) petitioner backed off only after Hall pulled his weapon and shot the petitioner in the finger, and (5) as a result of the wound the petitioner inflicted, Hall was hospitalized.[70]

In the face of this uncontroverted testimony, at the punishment phase of petitioner's trial, the defense elicited testimony from petitioner's family and friends that petitioner (1) was a happy-go-lucky, non-violent person, (2) claimed to have found God, first in 1978-79 before his rape and robbery of an elderly woman and then again in March, 1980, just before petitioner's last two assaults on jail guards described above, (3) corresponded with, drew pictures for, and wrote

---

[69] See S.F. Trial, Volume 6 , testimony of Ralph Vickrey, at pp. 16-18, 22, and 31-32.

[70] See S.F. Trial, Volume 6, testimony of Kenneth Hall, at pp. 71-80.

poetry to a fourteen-year-old suicidal girl, and thereby helped that girl, (4) was a talented artist and poet, (5) had attempted to bring other people to Christ, (6) had experienced a "normal" childhood as the fifth of nine children in a hard-working, middle-class, religious family in which both parents were present and his father, a federal government employee, was a strict disciplinarian, (7) lived on a farm where he had a pet horse and he and his siblings raised their own vegetables and a few hogs which the family slaughtered, (8) always ate well and played in a couple of the family's tree houses, (9) lived near his grandparents, (10) got along great with his fellow classmates, (11) was an excellent football player, but (12) nonetheless dropped out of high school his senior year and, shortly thereafter, was arrested and sent to the penitentiary at age eighteen.[71]

---

[71] See S.F. Trial, Volume 6, testimony of Lee Griswold, at pp. 84-97; testimony of Linda Cowart, at pp. 98-102; testimony of Cynthia Parks Lee, at pp. 104-18; testimony of Hubert Holston, at pp. 119-24; testimony of Paquita Richardson, at pp. 126-40; testimony of Lillie Rex, at pp. 239-42; testimony of Norb Kabelitz, at pp. 243-71; and testimony of Wayne Bernard, at pp. 273-79.

The most extensive testimony on petitioner's behalf at the punishment phase of trial came from (1) petitioner's sister Paquita, who testified that (1) petitioner enjoyed an almost idyllic childhood in a "typical middle-class family atmosphere, (2) their parents were good, decent people, and (3) there were no terrible scars in their family life, see S.F. Trial, Volume 6, at pp. 126.40; petitioner's family Pastor Norb Kabelitz testified that (1) he had known petitioner's family since petitioner was eleven years old, (2) he knew petitioner's family well, (3) petitioner had

In rebuttal, the prosecution introduced uncontroverted testimony establishing that (1) on an occasion in January, 1979, a gun-wielding petitioner led two other men in a robbery of four elderly persons, (2) during the offense, petitioner threatened to kill all of his victims, and (3) petitioner's offense culminated in petitioner's rape of one of his female victims, who got a good look at petitioner.[72]

With all due respect, given (1) the heinous nature of petitioner's offense, (2) petitioner's relative youth at the time of trial, (3) petitioner's repeated acts of violence while in custody awaiting trial, (4) petitioner's failure to make any expression of sincere contrition for his crime, (5) petitioner's

---

some difficulty reading that affected his self-image but petitioner was a well-behaved young man who got along well with his peers at school, (4) petitioner did witness several incidents of racial violence directed toward Blacks during the late-sixties and early-seventies when desegregation finally came to Oklahoma City, (5) petitioner did not tend toward violence at that time, and (6) since his arrest, petitioner had learned to face his pain without turning to drugs and to find outlets through his artistic talents, see **Id.**, testimony of Norb Kabelitz, at pp. 243-71; and, perhaps ironically, prosecution expert witness Dr. Robert Rast, who testified regarding the many psychological and psychiatric studies reporting the great difficulty experts in the mental health field experience attempting to predict future violence by incarcerated criminals, see **Id.**, testimony of Dr. Robert Rast, at pp. 222-25 and 230-31.

[72] See S.F. Trial, Volume 6, testimony of Mary Wilkinson, at pp. 171-82.

racist death threats to guards while in custody, and (6) the overwhelming weight of the evidence establishing petitioner's propensity for future violence, the trial court's failure to instruct the jury petitioner could be out of prison in only twenty years most certainly did not have a substantial and injurious effect or influence on the jury's verdict at the punishment phase of petitioner's trial. On the contrary, this Court concludes that, had the state trial court given the instruction petitioner now complains he was denied, it would have been tantamount to an instructed verdict for an affirmative finding on the second special sentencing issue regarding future dangerousness.

3. AEDPA Analysis

In the case of Norman Evans Green, Judge H.F. Garcia, writing for this Court, rejected precisely the same argument petitioner raises herein as his first claim for relief. The Fifth Circuit subsequently affirmed that decision in a published opinion in which it adopted not only Judge Garcia's reasoning but also much of the specific language in Judge Garcia's opinion as well.[73] For the reasons set forth in Judge Garcia's opinion in **Green**, as quoted by the Fifth Circuit, petitioner's initial claim for federal habeas relief herein does not establish petitioner's federal constitutional rights were violated by the state trial court's failure to instruct

---

[73] See **Green v. Johnson**, 160 F.3d at 1044-45(rejecting equal protection, due process, and Eighth Amendment challenges to the failure to instruct a Texas capital sentencing jury on parole eligibility).

petitioner's jury on parole eligibility at the punishment phase of petitioner's trial:[74]

> Petitioner argues that the failure of his trial court to instruct the jury at the punishment phase of his trial prevented his jury from fully understanding the true nature of a life sentence under applicable Texas law and thus, violated the principle announced by the Supreme Court in **Simmons v. South Carolina**.[75] * * *
>
> Petitioner's reliance on **Simmons** is misplaced for a number of reasons. First, the Supreme Court took great pains in its opinion in **Simmons** to distinguish states such as Texas, which do not provide capital sentencing juries with an option of life without parole, from the scheme in South Carolina which required an instruction on parole ineligibility.[76] Second, the Fifth Circuit has repeatedly refused to extend the rule in Simmons beyond those situations in which a capital murder defendant is statutorily ineligible for parole.[77] * * *

---

[74] **Green v. Johnson**, SA-94-CA-1008-HG (W.D. Tex. Dec. 23, 1997) at p. 114 (unpublished Memorandum Opinion and Order).

[75] 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994).

[76] See **Simmons v. South Carolina**, 512 U.S. at 168 & n.8.

[77] See **Johnson v. Scott**, 68 F.3d at 111-12; **Montoya v. Scott**, 65 F.3d at 416; **Allridge v. Scott**, 41 F.3d at 222;

Furthermore, the Supreme Court expressly noted in **Simmons** that when the state argues a defendant poses a continuing threat to not only free society but also to others within the prison setting, the concerns that underlie its opinion in that case are absent.[78] The prosecution introduced substantial evidence at the punishment phase of petitioner's trial showing petitioner had engaged in repeated acts of violence while in custody and had threatened to inflict more violence on his captors if he were ever released from custody and argued in closing argument at the punishment phase of petitioner's trial that this evidence established petitioner's propensity for future violence regardless of whether petitioner were incarcerated.[79] Thus, even disregarding the completely divergent parole systems applicable to Simmons and petitioner, petitioner's case is factually distinguishable from **Simmons**. The status of Texas parole law in 1981 did not constitute mitigating evidence at the punishment phase of petitioner's capital murder trial and petitioner was not entitled to a jury instruction regarding same at the punishment phase of his trial.[80]

Kinnamon v. Scott, 40 F.3d 731, 733 (5th Cir.), **cert. denied**, 513 U.S. 1054 (1994).

[78] See **Simmons v. South Carolina**, 512 U.S. at 165 n.5; **Allridge v. Scott**, 41 F.3d at 222 n.12(noting that Simmons argued that because his proclivity for violence was limited to assaulting only elderly women, he would not be a threat in prison).

[79] See S.F. Trial, Volume 6, at pp. 285-90 and 310-14.

[80] See **Green v. Johnson**, 160 F.3d at 1045; **Madden v. Collins**, 18 F.3d 304, 310 (5th Cir. 1994), **cert. denied**,

For the foregoing reasons, the Texas Court of Criminal Appeals' rejection of petitioner's first claim for relief herein in the course of petitioner's state habeas corpus proceeding was neither (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore, petitioner's initial claim does not warrant federal habeas relief under the AEDPA.

4. Conclusions

Regardless of whether this Court employs a de novo standard or the AEDPA's controversial standard of review, petitioner's first claim for federal habeas relief does not warrant same. In addition to lacking merit, this claim is barred not only by the **Teague** doctrine but also by the harmless error rule. The evidence of both the deliberateness of petitioner's offense and petitioner's future dangerousness was so overwhelming that a parole instruction informing the jury petitioner could be a free man in only twenty years would have virtually guaranteed affirmative answers to the Texas capital sentencing special issues. Moreover, the law in this Circuit is well-settled on this issue; petitioner is not entitled to a Certificate of Appealability on this issue.[81]

B. **Penry** and Quasi-**Penry** Claims

---

513 U.S. 1156 (1995); **Andrade v. McCotter**, 805 F.2d at 1192-93.

[81] See **Miller v. Johnson**, 200 F.3d at 290-91(holding that the exact same claim asserted by petitioner herein as his first claim for relief did not warrant issuance of a CoA).

1. The Claims

In his second group of claims for relief herein, petitioner argues (1) the trial court erred in refusing to give a jury instruction at the punishment phase of petitioner's trial advising the jury it could consider and give mitigating effect to petitioner's evidence of his "mental disorder that prevented him from learning from his mistakes," troubled childhood, religious devotion, voluntary service, kindness to others, artistic and poetic talent, and close family ties and (2) the Texas capital sentencing scheme at the time of petitioner's trial effectively "chilled" the ability of petitioner's trial counsel to develop and introduce evidence showing petitioner had been the victim of sexual and physical abuse by his father and other siblings.[82]

2. De Novo Review

a. **Penry** Redraws the Legal Landscape

The first portion of petitioner's second group of claims are essentially arguments that petitioner was entitled to a special jury instruction at the punishment phase of his trial of the type mandated by the Supreme Court's opinion in **Penry** v. **Lynaugh**.[83]

---

[82] See Amended Petition, at pp. 25-40; Reply Memorandum, at pp. 8-10.

[83] 492 U.S. 302 (1989). For a thorough history of the Supreme Court's opinion in **Penry** and the many Supreme Court and Fifth Circuit opinions that have construed the holding in **Penry**, see this Court's opinions in both **Cordova v. Johnson**, 993 F.Supp. 473, 496-500 (W.D. Tex.), **aff'd**, 157 F.3d 380 (5th Cir. 1998), **cert. denied**,

In **Penry**, decided June 26, 1989, almost eight years after the date the state trial court submitted its jury instructions at the punishment phase of petitioner's trial, the Supreme Court held the Texas capital sentencing scheme unconstitutional as applied to a defendant who had introduced evidence of his abusive childhood, organic brain damage, mental retardation, and resulting inability to learn from his mistakes.[84] More specifically, Penry had introduced evidence during his trial which established (1) he suffered from organic brain damage and mental retardation, (2) those conditions made it impossible for him to appreciate the wrongfulness of his conduct or to conform his conduct to the law, (3) when he was child, his mother frequently beat him over the head with a belt and routinely locked him in his room without access to the toilet for long periods of time, and (4) even the prosecution's experts agreed the defendant's extremely limited mental ability rendered him unable to learn from his mistakes.[85] The Supreme Court subsequently explained it

---

525 U.S. 1131 (1999); **Adanandus v. Johnson**, 947 F.Supp. 1021, 1039-41 (W.D. Tex. 1996), **aff'd**, 114 F.3d 1181 (5th Cir. 1997) [Table].

[84] See **Penry v. Lynaugh**, 492 U.S. at 309-10.

[85] **Id.** In addition, Penry introduced evidence that (1) he was unable to learn in school and never finished the first grade, (2) he suffered brain damage, probably caused at birth but which may have been caused by beatings and multiple injuries to his brain at an early age, (3) his mother frequently beat him over the head with a belt when he was a child, (4) he was routinely locked in his room without access to a toilet for long periods of time, (5) his aunt struggled for over a year to teach him to print his

considered the foregoing evidence to be "mitigating" because it indicated the defendant suffered from a diminished ability to control his impulses or to evaluate the consequences of his conduct and therefore reduced his moral culpability.[86] The Supreme Court majority concluded in **Penry** that in answering the three special issues submitted to it during the punishment phase of trial,[87] Penry's Texas jury had not been

---

name, and (6) as a youngster, he was in and out of state schools and hospitals until age twelve. **Id.**

[86] See **Graham v. Collins**, 506 U.S. 461, 473 (1993) (quoting **Penry v. Lynaugh**, 492 U.S. at 322).

[87] At the time of petitioner's capital murder trial in October, 1989, the Texas capital sentencing procedure called for a bifurcated trial in which the guilt or innocence phase of the trial occurred prior to any consideration of punishment by the jury. In the event the jury found the defendant guilty of capital murder, the same jury would remain empaneled and the punishment phase of the trial would proceed. See TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981). At that time, the Texas capital sentencing statute directed the trial court to submit the following issues to the jury at the punishment phase of the capital trial:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

able to consider and give effect to all of Penry's mitigating evidence "without any jury instructions on mitigating evidence.[88] Therefore, the Supreme Court concluded Penry was constitutionally entitled to further instructions informing the jury it could consider and give effect to his evidence by declining to impose the death penalty.[89]

---

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. Also at the time of the petitioner's trial, the Texas capital sentencing statute directed the trial court to instruct the jury that "(1) it may not answer any issue 'yes' unless it agrees unanimously; and (2) it may not answer any issue 'no' unless 10 or more jurors agree." See TEX. CODE CRIM. PROC. ANN. art. 37.071(d) (Vernon 1981). The Texas capital sentencing statute also provided as follows:

If the jury returns an affirmative finding on each special issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding or is unable to answer any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

See TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1981) (emphasis added).

[88] See **Graham v. Collins**, 506 U.S. 461, 474-75 (1993) (quoting **Penry v. Lynaugh**, 492 U.S. at 322).

[89] See **Graham v. Collins**, 506 U.S. at 474 (quoting **Penry v. Lynaugh**, 492 U.S. at 328). For a discussion of

In several subsequent decisions, however, the Supreme Court has taken great pains to narrowly circumscribe its holding in **Penry**.[90] In **Graham** v. **Collins**, the Supreme Court held its opinion in **Penry** should not be construed as broadly suggesting the invalidity of the Texas special issue framework and held Graham's sentencing jury could give adequate consideration, without the necessity of a

---

the Supreme Court's holding in **Jurek v. Texas**, 428 U.S. 262 (1976), and the relationship between that opinion and the holding in **Penry**, see **Adanandus v. Johnson**, 947 F.Supp. at 1039-41.

[90] See **Arave v. Creech**, 507 U.S. 463, 470-71 (1993) (holding that to satisfy the Eighth and Fourteenth Amendments, a capital sentencing scheme must suitably direct and limit the sentencer's discretion so as to minimize the risk of wholly arbitrary and capricious action and that the limits on the sentencer's discretion must constitute clear and objective standards that provide "specific and detailed guidance" and make rationally reviewable the process for imposing the death penalty); **Saffle v. Parks**, 494 U.S. 484, 491-93 (1990) (holding that within certain parameters, the State is free to channel or focus the jury's consideration of the defendant's mitigating evidence and emphasizing that "above all, capital sentencing must be reliable, accurate, and nonarbitrary"); **Boyde v. California**, 494 U.S. 370, 380 (1990) (holding that a defendant must show more than that a capital sentencing scheme might have resulted in the jury being prevented from considering mitigating evidence of the defendant's character and background; the petitioner must show a reasonable likelihood that such actually occurred).

Penry instruction, to Graham's mitigating evidence of his youth, good character traits, efforts to be a responsible father, non-violent and religious nature, and unstable family background.[91] In **Johnson v. Texas**,[92] the Supreme Court upheld a Texas prisoner's capital murder conviction and death sentence against a claim that the former Texas capital murder statute precluded the jury from considering and giving effect to mitigating evidence of the defendant's youth at the time of his offense.[93] Thus, while the Supreme Court has emphasized in its post **Penry** opinions the broad scope of potentially mitigating evidence that a Texas capital sentencing jury may adequately consider without the necessity of a **Penry** instruction, that Court has taken great pains not to require

---

[91] See **Graham v. Collins**, 506 U.S. at 475-77. Significantly, in **Graham**, the Supreme Court rejected the suggestion that a **Penry** instruction was constitutionally mandated whenever a capital murder defendant offered mitigating evidence that had some arguable relevance beyond the Texas special sentencing issues. **Id.**

[92] 509 U.S. 350 (1993) .

[93] See **Johnson v. Texas**, 509 U.S. 350 (1993). The Supreme Court emphasized in **Johnson** that its previous opinions do not require that "a jury must be able to dispense mercy on the basis of a sympathetic response to the defendant." **Id.** at 371-72. However, the Supreme Court's opinion in **Johnson** includes a lengthy discussion regarding the inherently mitigating nature of evidence that the defendant was young or immature at the time of the capital offense. See **Johnson v. Texas**, 509 U.S. at 367-70.

explicit consideration of all evidence which might arguably possess some potential mitigating value.[94]

Contrary to the suggestions implicit in petitioner's second group of claims for relief herein, neither before nor after **Penry** has the Supreme Court ever recognized any broad-ranging Eighth Amendment right to either (1) compel a capital sentencing authority to consider any and all manner of evidence which a capital murder defendant considers "relevant" in an abstract sense when deciding whether to impose the death penalty or (2) require the sentencing authority to consider an emotional appeal based on purportedly mitigating evidence. In **Lockett v. Ohio**, the Supreme Court plurality expressly acknowledged the "traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."[95] In **Skipper v South Carolina**, the Supreme Court majority specifically disavowed the suggestion that "all facets of the defendant's ability to adjust to prison life must be treated as relevant and

---

[94] See **Johnson v. Texas**, 509 U.S. at 371-72 (rejecting the contention that a **Penry** instruction is necessary in every case in which the defendant offers mitigating evidence that has some arguable relevance beyond the special issues and emphasizing that its previous opinions do not require that a jury be able to dispense mercy on the basis of a sympathetic response to the defendant); **Graham v. Collins**, 506 U.S. at 476 (rejecting the contention that a **Penry** instruction is necessary in every case in which the defendant offers mitigating evidence that has some arguable relevance beyond the special issues).

[95] **Lockett v. Ohio**, 438 U.S. at 604 n.12.

potentially mitigating."[96] In **California v. Brown**,[97] a Supreme Court plurality upheld as constitutional a capital sentencing jury instruction which directed the jury not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling.[98] In **Franklin v. Lynaugh**,[99] a majority of Supreme Court justices agreed that (1) a capital sentencing authority is not constitutionally required to give consideration to "residual doubts" about the defendant's innocence because such matters are relevant to neither the defendant's character or record nor the circumstances of the offense[100] and (2) the Texas capital sentencing special issue regarding future dangerousness affords the sentencing jury adequate opportunity to consider a capital murder defendant's evidence of his good behavior in prison[101] In **Saffle v. Parks**, the Supreme Court upheld as

---

[96] **Skipper v. South Carolina**, 476 U.S. at 7 n.2.

[97] 479 U.S. 538 (1987).

[98] **California v. Brown**, 479 U.S. at 542-43.

[99] 487 U.S. 164 (1988).

[100] See **Franklin v. Lynaugh**, 487 U.S. at 172-74 (plurality opinion of Justice White, joined by the Chief Justice and Justices Scalia and Kennedy); **Franklin v. Lynaugh**, 487 U.S. at 188 (concurring opinion of Justices O'Connor and Blackmun concluding that "residual doubts" is neither relevant to the defendant's character nor the circumstances of the offense).

[101] **Franklin**, 487 U.S. at 177-80. The concurring Justices agreed with this treatment of Franklin's meager evidence regarding his good behavior in prison. **Id.** at 184-87(O'Connor and Blackmun concurring).

constitutional a jury instruction directing a capital sentencing jury to "avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence"[102] and held the Constitution does not require that the jury be allowed to consider and make a purely emotional response to mitigating evidence.[103] In **Tuilaepa v. California**,[104] the Supreme Court distinguished the two aspects of the capital decision-making process, i.e., the eligibility decision and the selection process, and emphasized that, while both inquiries necessarily involve resolution of issues that bear a factual nexus to the crime, the selection process must also focus on the character and record of the defendant.[105] In **Buchanan v. Angelone**,[106] the Supreme

---

[102] See **Saffle v. Parks**, 494 U.S. at 489-94. "The State must not cut off full and fair consideration of mitigating evidence; but it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice. **Id.** at 493.

[103] **Id.** at 494.

[104] 512 U.S. 967 (1994).

[105] See **Tuilaepa v. California**, 512 U.S. at 971-73. **Tuilaepa** is significant to the jurisprudence of Eighth Amendment claims because it represents the first time that the Supreme Court set forth a comprehensive analytical approach to Eighth Amendment claims. Equally significant is the fact that although there were several separate concurring opinions joining Justice Kennedy's opinion for the Court, six of the Justices appeared to agree on the propriety of the analytical framework set forth by Justice Kennedy. **Tuilaepa** holds that the Eighth Amendment address two different but related aspects of

capital sentencing: the eligibility decision and the selection decision. Id. at 971. The Supreme Court's analysis of those aspects of capital sentencing provides the first clear insight into a comprehensive system for analyzing Eighth Amendment claims:

To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one "aggravating circumstance" (or its equivalent) at either the guilt or penalty phase. The aggravated circumstance may be contained in the definition of the crime or in a separate sentencing factor (or both). As we have explained, the aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. Second, the aggravating circumstance may not be unconstitutionally vague.***

We have imposed a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence. "What is important at the selection state is an individualized determination on the basis of the character of the individual and the circumstances of the crime." That requirement is met when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime.

512 U.S. at 971-73 (citations omitted).

Court reaffirmed the vitality of the two-stage **Tuilaepa** analysis and rejected an argument that the Constitution mandates jury instructions at the selection stage of a capital sentencing proceeding regarding the nature of mitigating evidence or the manner in which the sentencing jury is to consider specific statutorily-defined mitigating factors, such as the defendant's age, lack of prior criminal activity, extreme emotional or mental disturbance, and significantly impaired capacity to appreciate the criminality of his conduct.[107]

The first part of the **Tuilaepa** analysis, i.e., the eligibility decision, was discussed by the Supreme Court in **Loving v. United States**.[108]

> The Eighth Amendment requires, among other things, that "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" Some schemes accomplish that narrowing by requiring that

---

[106] 522 U.S. 269 (1998).

[107] See **Buchanan v. Angelone**, 522 U.S. at 275-79. The Supreme Court's opinion in **Buchanan** emphasizes that the issue of proportionality in capital sentencing is to be addressed in the eligibility phase of a capital sentencing proceeding, wherein that court has stressed the need for channeling and limiting the jury's discretion to ensure the death penalty is not arbitrarily or capriciously imposed. **Id.** at 275-78.

[108] 517 U.S. 748 (1996).

> the sentencer find at least one aggravating circumstance. The narrowing may also be achieved, however, in the definition of the capital offense, in which circumstance the requirement that the sentencer "find the existence of the aggravating circumstance in addition is no part of the constitutionally required narrowing process."[109]

Under the Texas capital sentencing scheme, this constitutionally mandated narrowing function is performed at the guilt-innocence phase of trial.[110] It is in the selection phase that a sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence.[111] Therefore, this Court's analysis of the petitioner's claims regarding

---

[109] 517 U.S. 748 (1996) (citations omitted). The Supreme Court's opinion in **Buchanan v. Angelone** includes a further elaboration on the distinction between the narrowing function or eligibility decision and the selection phase of a capital sentencing proceeding. See **Buchanan v. Angelone**, 522 U.S. at 275-78.

[110] See **Johnson v. Texas**, 509 U.S. at 362 (holding that its previous opinions upholding the Texas capital sentencing scheme found no constitutional deficiency in the means used to narrow the group of offenders subject to capital punishment because the statute itself adopted five different classifications of murder for that purpose); **Lowenfield v. Phelps**, 484 U.S. 231, 243-47 (1988); **Jurek v. Texas**, 428 U.S. at 268-75; **West v. Johnson**, 92 F.3d at 1406; **Woods v. Johnson**, 75 F.3d at 1033-34.

[111] See **Buchanan v. Angelone**, 522 U.S. at 275-78.

mitigating evidence must focus on the second aspect of the **Tuilaepa** analysis.

b. Subsequent Treatment of **Penry** Mitigating Evidence

In the wake of **Penry** and the other Supreme Court opinions summarized above, both the Supreme Court and the Fifth Circuit have addressed a wide range of constitutional challenges to individual applications of the Texas capital sentencing scheme. From those opinions, it is possible to discern an approach to the subject of mitigating evidence. The Supreme Court and Fifth Circuit have each emphasized that a jury in a capital murder trial must be permitted to examine the defendant's character and record, as well as the circumstances of the particular offense in determining whether to impose the death penalty:

> [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.[112]

Therefore, a sentencing jury in a capital murder trial may not be prevented from considering any mitigating evidence presented by the defendant which relates to the defendant's character or record or the circumstances of the

---

[112] **Lockett v. Ohio**, 438 U.S. at 604; **Sawyers v. Collins**, 986 F.2d 1493, 1497 (5th Cir. 1992), **cert. denied**, 508 U.S. 933 (1993)(both quoting **Woodson v. North Carolina**, 428 U.S. at 304).

offense.[113] In other words, the jury at petitioner's trial must have been afforded adequate opportunity to give effect to petitioner's mitigating evidence of his character and background, as well as his evidence of the circumstances surrounding his offense.

The Fifth Circuit has held that a **Penry** instruction is only required in those instances in which the major mitigating thrust of the evidence is substantially beyond the scope of all the special issues under the Texas capital sentencing scheme.[114] The Fifth Circuit has recognized a wide range of

---

[113] See **Buchanan v. Angelone**, 522 U. S. at 275-78; **Eddings v. Oklahoma**, 455 U.S. at 113-17; **Sawyers v. Collins**, 986 F.2d at 1497. However, the Fifth Circuit's opinion in **Sawyers** must be read in conjunction with the Supreme Court's more recent opinions addressing the former Texas capital sentencing statute. See **Johnson v. Texas**, 509 U.S. at 372-73 (rejecting the contention that a **Penry** instruction is necessary in every case in which the defendant offers mitigating evidence that has some arguable relevance beyond the special issues and emphasizing that its previous opinions do not require that a jury be able to dispense mercy on the basis of a sympathetic response to the defendant); **Graham v. Collins**, 506 U.S. at 476(rejecting the contention that a **Penry** instruction is necessary in every case in which the defendant offers mitigating evidence that has some arguable relevance beyond the special issues).

[114] See **Nethery v. Collins**, 993 F.2d 1154, 1161 (5th Cir. 1993), **cert. denied**, 511 U.S. 1026 (1994); **Bridge v. Collins**, 963 F.2d 767, 770 (5th Cir. 1992), **cert. denied**, 509 U.S. 925 (1993); **Holland v. Collins**, 962 F.2d 417, 419-20 (5th Cir. 1992), **cert. denied**, 509 U.S. 925

potentially mitigating evidence can be considered within the scope of the Texas capital sentencing special issues without the necessity for a **Penry** instruction.[115] The Supreme Court

---

(1993); **White v. Collins**, 959 F.2d 1319, 1322 (5th Cir.), **cert. denied**, 503 U.S. 1001 (1992); **Barnard v. Collins**, 958 F.2d 634, 637 (5th Cir. 1992), **cert. denied**, 506 U.S. 1057 (1993); **Graham v. Collins**, 950 F.2d 1009, 1030-33 (5th Cir. 1992),(en banc), **aff'd**, 506 U.S. 461 (1993).

[115] See **Robison v. Johnson**, 151 F.3d at 266 (evidence the defendant had a history of drug and alcohol abuse and suffered from hereditary schizophrenia that was treatable and episodic in nature); **Lucas v. Johnson**, 132 F.3d at 1082 (evidence the defendant was psychotic and suffered from schizophrenia but responded well to anti-psychotic drugs like Thorazine and could be treated in a controlled environment); **Tucker v. Johnson**, 115 F.3d 276, 281-82 (5th Cir.), **cert. denied**, 522 U.S. 1017 (1997) (evidence of the defendant's youth, intoxication at the time of the offense, and chronic drug and alcohol abuse which resulted in arrested emotional development); **Turner v. Johnson**, 106 F.3d 1178, 1189 (5th Cir. 1997) (evidence of the defendant's youth and good behavior during pretrial detention); **West v. Johnson**, 92 F.3d at 1405 (the defendant's testimony that he had been drinking and was intoxicated and his confession that he had "blown up" in response to his victim's verbal statements); **Nichols v. Scott**, 69 F.3d 1255, 1267-68 & 1278 (5th Cir. 1995), **cert. denied**, 518 U.S. 1022 (1996) (evidence the defendant was not the triggerman and evidence showing the defendant's good character); **Briddle v. Scott**, 63 F.3d 364, 377 (5th Cir.), **cert. denied**, 516 U.S. 1033 (1995) (evidence of the defendant's remorse and voluntary intoxication at the time of his offense); **Davis v. Scott**, 51

F.3d 457, 462-65 (5th Cir.), **cert. denied**, 516 U.S. 992 (1995) (evidence the defendant suffered from schizophrenia, psychotic disorders, and violent sexual proclivities); **Lackey v. Scott**, 28 F.3d 486, 489 (5th Cir. 1994), **cert. denied**, 513 U.S. 1086 (1995) (evidence of the defendant's intoxication); **Crank v. Collins**, 19 F.3d 172, 175 (5th Cir.), **cert. denied**, 512 U.S. 1214 (1994) (evidence of the defendant's good character); **Nethery v. Collins**, 993 F.2d at 1161 (evidence of the accused's voluntary intoxication); **James v. Collins**, 987 F.2d 1116, 1121-22 (5th Cir.), **cert. denied**, 509 U.S. 947 (1993)(evidence of the accused's voluntary intoxication, impoverished and abusive family history, redeeming character traits, including his remorse for his actions, his cooperation with law enforcement authorities, and his positive familial ties); **Jernigran v. Collins**, 980 F.2d 292, 295 (5th Cir. 1992), **cert. denied**, 508 U.S. 978 (1993) (evidence the defendant was a kind, gentle person who had rededicated his life to God); **Stewart v. Collins**, 978 F.2d 199, 201 (5th Cir. 1992), **cert. denied**, 507 U.S. 1053 (1993) (evidence that the defendant was not the triggerman); **Demouchette v. Collins**, 972 F.2d 651, 653-54 (5th Cir.), **cert. denied**, 505 U.S. 1246 (1992)(evidence the defendant suffered from antisocial personality disorder); **Cantu v. Collins**, 967 F.2d 1006, 1012-13 (5th Cir. 1992), **cert. denied**, 509 U.S. 926 (1993) (evidence of the defendant's youth); **Drew v. Collins**, 964 F.2d 411, 420-21 (5th Cir. 1992), **cert. denied**, 509 U.S. 925(1993) (evidence the defendant had a troubled childhood, had a chronic drinking problem, was under the influence of alcohol and marijuana at the time he committed the crime, was only 23 years old at the time of the offense, and did not strike the fatal blow); **Bridge v. Collins**, 963 F.2d 767, 769-70 (5th Cir. 1992), **cert.**

denied, 509 U.S. 925 (1993) (evidence the defendant's accomplice actually shot the victim, the defendant was intoxicated at the time of the offense, the defendant did not plan the robbery, the defendant was operating under influence of others during the offense, the defendant expressed extreme remorse following the offense, the defendant was young and immature at the time of the offense, and had no previous history of violence); **Holland v. Collins**, 962 F.2d 417, 419-20 (5th Cir. 1992), **cert. denied**, 509 U.S. 925 (1993)(evidence of the defendant's positive personality traits); **Black v. Collins**, 962 F.2d 394, 404-05 (5th Cir.), **cert. denied**, 504 U.S. 992 (1992) (evidence of defendant's good character, military service, and work with the Boy Scouts); **White v. Collins**, 959 F. 2d 1319, 1324 (5th Cir.), **cert. denied**, 503 U.S. 1001 (1992) (evidence of the defendant's youthful age at the time of his offense); **Lincecum v. Collins**, 958 F.2d 1271, 1282-84 (5th Cir.), **cert. denied** 506 U.S. 957 (1992) (evidence of the accused's troubled childhood and his emotional turmoil at the time of his offense); **Barnard v. Collins**, 958 F.2d 634, 638-39, (5th Cir. 1992), **cert. denied**, 506 U.S. 1057 (1993) (defendant's evidence of his head injury, troubled childhood, drug and alcohol abuse, good character, work history, carpentry skills, and familial responsibility and support); **Cordova v. Collins**, 953 F.2d 167, 170 (5th Cir.), **cert. denied**, 502 U.S. 1067 (1992) (defendant's testimony of his voluntary intoxication at the time of his offense); **Graham v. Collins**, 950 F.2d 1009, 1032-33 (5th Cir. 1992)(en banc), **aff'd**, 506 U.S. 461, (1993) (evidence that the defendant was of a normal or good character, respected his mother and stepfather, cared for and was close to his mother, was never violent, never had weapons, helped out around the house without being

and Fifth Circuit have each held the Texas capital sentencing special issues allow adequate consideration of the mitigating effects of evidence of a defendant's youth so as to negate the necessity for a **Penry** instruction on such evidence.[116] Likewise, the Fifth Circuit has repeatedly held the Texas capital sentencing special issues are sufficiently broad to permit adequate consideration of evidence the accused was voluntarily intoxicated at the time of his offense.[117] The Fifth

---

asked, went to school and church regularly, loved "The Lord", and worked and contributed to the support of his two children); **Green v. Collins**, 947 F.2d 1230, 1232 (5th Cir.), **cert. denied**, 502 U.S. 954 (1991)(evidence the defendant was a good worker, had been a foreman, would have been re-employed by his former employer had he not been incarcerated, was highly intelligent, optimistic, and had the mental capacity to address small details).

[116] See **Johnson v. Texas**, 509 U.S. at 365-70; **Tucker v. Johnson**, 115 F.3d at 281-82; **Turner v. Johnson**, 106 F.3d at 1189; **Drew v. Collins**, 964 F.2d at 420-21; **Barnard v. Collins**, 958 F.2d at 637-38; **Wilkerson v. Collins**, 950 F.2d 1054, 1060-61 (5th Cir. 1992), **cert. denied**, 509 U.S. 921 (1993); **Graham v. Collins**, 950 F.2d at 1030-32.

[117] See **Turner v. Johnson**, 115 F.3d at 281-82; **West v. Johnson**, 92 F.3d at 1405; **Briddle v. Scott**, 63 F.3d at 377; **Lackey v. Scott**, 28 F.3d at 489; **Anderson v. Collins**, 18 F.3d at 12-13 n.5; **Nethery v. Collins**, 993 F.2d at 1161; **James v. Collins**, 987 F.2d at 1121; **Sawyers v. Collins**, 986 F.2d at 1502 n.14; **Drew v. Collins**, 964 F.2d at 420; **Bridge v. Collins**, 963 F.2d at 770; **Barnard v. Collins**, 958 F.2d at 639; **Cordova v. Collins**, 953 F.2d at 170; and **Graham v. Collins**, 950

Circuit has also repeatedly held a Texas capital sentencing jury may give adequate consideration to evidence showing a defendant neither fired the fatal shot nor delivered the fatal blow without the necessity of a **Penry** instruction.[118] Thus, evidence of such matters does not require any special jury instructions; Texas sentencing juries can adequately consider these types of evidence without the necessity of supplemental jury instructions like those mandated by **Penry**.

Consistent with the Supreme Court opinions summarized above, the Fifth Circuit has also held that to constitute relevant mitigating evidence for **Penry** purposes, evidence of a defendant's background and character must relate to and diminish the defendant's moral culpability for the offense with which he is charged.[119] Thus, the first inquiry

---

F.2d at 1029. In each of these opinions, the Fifth assumed without analysis that evidence of the defendant's voluntary intoxication at the time of his offense fell within the parameters of constitutionally relevant mitigating evidence.

[118] See **Nichols v. Scott**, 69 F.3d at 1267-68; **Stewart v. Collins**, 978 F.2d at 201; **Drew v. Collins**, 964 F.2d at 420-21; **Bridge v. Collins**, 963 F.2d at 769-70.

[119] See **Jones v. Johnson**, 171 F.3d 270, 275-76 (5th Cir.), **cert. denied**, 120 S. Ct. 29 (1999)(holding that evidence of low intelligence, including mild retardation, did not warrant a **Penry** instruction where it was not accompanied by a showing of a nexus between that handicap and the criminal act); **Turner v. Johnson**, 106 F.3d at 1189 (holding that "for evidence to have mitigating relevance, there must be a nexus between the mitigating evidence and the criminal act); **Harris v. Johnson**, 81 F.3d 535,

539 (5th Cir.), **cert. denied**, 517 U.S. 1227 (1996)(holding that no **Penry** instruction was necessary where there was no evidence showing that the defendant's borderline intelligence bore a nexus to his criminal actions); **Allridge v. Scott**, 41 F.3d 213, 223 (5th Cir. 1994), **cert. denied**, 514 U.S. 1108 (1995)(holding that no **Penry** instruction was necessary in the absence of evidence showing that the defendant's criminal conduct was attributable to the mental illness and abuse the had defendant suffered during a previous incarceration); **Lackey v. Scott**, 28 F.3d at 489(holding that evidence of the defendant's low intelligence and history of childhood abuse was not relevant for **Penry** purposes where there was no evidence showing the defendant's criminal act was attributable to same); **Madden v. Collins**, 18 F.3d 304, 307-08 (5th Cir. 1994) **cert. denied**, 513 U.S. 1156 (1995)(holding that evidence the defendant suffered from an anti-social personality, dyslexia, and a troubled childhood was not relevant for **Penry** purposes absent a showing that the defendant's criminal conduct was attributable to same); **Russell v. Collins**, 998 F.2d 1287, 1292-93 (5th Cir. 1993), **cert. denied**, 510 U.S. 1185 (1994)(holding that evidence of a single instance of physical abuse by the petitioner's stepfather did not constitute relevant mitigating evidence when unaccompanied by any other evidence showing that the incident left the petitioner mentally or emotionally impaired or more predisposed to commit murder); **Barnard v. Collins**, 958 F.2d at 638-39(holding that, in order to warrant a **Penry** instruction, evidence that a defendant had a troubled childhood must be accompanied by evidence that the defendant's childhood experiences had a psychological effect on the defendant, i.e., that the defendant's criminal conduct was attributable to his

in a **Penry** claim is whether the mitigating evidence is relevant, i.e., does the evidence implicate the basic concern of **Penry** that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.[120] In order to meet this relevance

---

disadvantaged background); **Graham v. Collins**, 950 F. 2d at 1033 (holding that "mitigating" evidence must be able to raise an inference "that the crime is attributable to the disability"); see also **Barnard v. Collins**, 958 F.2d at 639 (holding that evidence from lay witnesses that the defendant had a drinking problem and was intoxicated at the time of his offense was insufficient to permit the jury to conclude that the defendant therein suffered from alcoholism or drug addiction or some other "uniquely severe permanent handicap" through no fault of his own).

[120] In both **Penry v. Lynaugh** and **Buchanan v. Angelone**, the Supreme Court addressed situations in which a capital murder defendant had presented evidence at trial that he had suffered extensive physical or emotional child abuse and expert testimony which directly linked the defendant's troubled childhood to the specific capital murder with which the defendant was charged. See **Penry v. Lynaugh**, 492 U.S. at 307-10; **Buchanan v. Angelone**, 522 U.S. at 271-72. While a rational jury may infer that evidence of a long-standing pattern of severe physical or emotional abuse inflicted upon a child of tender years renders that child less morally culpable for a violent crime, isolated episodes of violence or physical abuse inflicted upon a defendant do not, standing alone, constitute relevant mitigating evidence because there is no inherent nexus between such isolated episodes and the capital offense. See **Russell v. Collins**, 998 F.2d at 1292-

standard, the evidence must show (1) a uniquely severe, permanent handicap with which the defendant is burdened through no fault of his own and (2) the criminal act was attributable to this severe, permanent condition.[121] A properly preserved **Penry** claim will only prove meritorious if two requirements are met: first, the evidence proffered at trial must actually be "mitigating," i.e., it must relate to the defendant's character or background or to the circumstances of the offense and be sufficient to lead a reasonable juror to impose a penalty less than death, and second, the evidence proffered at trial must have been beyond the "effective reach" of the jury, i.e., there must be a reasonable likelihood the jury applied the Texas special issues in a way which prevented consideration of the constitutionally relevant mitigating evidence.[122] A failure to satisfy either prong of this analysis renders a **Penry** claim meritless.

---

93. Thus, absent evidence showing that extreme, severe, or sustained mental or physical abuse was inflicted upon a capital murder defendant during childhood, a defendant asserting a history of child abuse in mitigation at sentencing, the defendant must come forward with expert testimony or other evidence directly linking his or her capital offense to some form of physical, mental, or emotional abuse the defendant suffered as a child. **Id.**

121 See **Tucker v. Johnson**, 115 F.3d at 281; **Turner v. Johnson**, 106 F.3d at 1189; **Harris v. Johnson**, 81 F.3d at 539; **Davis v. Scott**, 51 F.3d at 460; **Russell v. Collins**, 998 F.2d at 1292-93.

122 **Turner v. Johnson**, 106 F.3d at 1189; **Madden v. Collins**, 18 F.3d at 308; **Russell v. Collins**, 998 F.2d at 1292-93.

Furthermore, **Penry** does not require that a sentencer be able to give effect to a defendant's mitigating evidence in whatever manner or to whatever extent the defendant desires.[123] A jury need only be provided one fair vehicle for considering mitigating evidence.[124] The State can "structure" the jury's consideration of mitigating evidence as long as it does not prevent the jury from giving effect to any constitutionally relevant mitigating evidence.[125] Finally, a defendant is entitled to a **Penry** instruction only with regard to evidence that was actually introduced or offered at trial; a petitioner may not base a **Penry** claim on evidence that could have been, but was not, proffered at trial.[126]

---

[123] **Marquez v. Collins**, 11 F.3d 1241, 1248 (5th Cir.), **cert. denied**, 513 U.S. 881 (1994); **White v. Collins**, 959 F.2d 1319, 1322 (5th Cir., **cert. denied**, 503 U.S. 1001 (1992).

[124] **Harris v. Collins**, 990 F.2d 185, 189 (5th Cir.), **cert. denied**, 509 U.S. 933 (1993); **White v. Collins**, 959 F.2d at 1322-23.

[125] See **Buchanan v. Angelone**, 522 U.S. at 276; **Johnson v. Texas**, 509 U.S. at 362; **Boyde v. California**, 494 U.S. at 377; **Rogers v. Scott**, 70 F.3d 340, 343 (5th Cir. 1995), **cert. denied**, 517 U.S. 1235 (1996).

[126] See **West v. Johnson**, 92 F.3d at 1405; **Briddle v. Scott**, 63 F.3d at 377; **Allridge v. Scott**, 41 F.3d at 223; **Crank v. Collins**, 19 F.3d at 176; **Anderson v. Collins**, 18 F.3d at 1214-15; **Calling v. Collins**, 998 F.2d at 275; **Barnard v. Collins**, 958 F.2d at 637; **Wilkerson v. Collins**, 950 F.2d at 1061; **May v. Collins**, 904 F.2d at 232; **DeLuna v. Lynaugh**, 890 F.2d at 722. Thus, petitioner is not entitled to rely upon evidence regarding his psychological and psychiatric history that was developed during his state

c. The **Penry** Evidence

The initial problem with petitioner's **Penry** claims is that the purported **Penry** evidence actually introduced at his trial is somewhat different than claimed in this proceeding. There was no evidence introduced showing petitioner suffered from any "mental disorder that prevented him from learning from his mistakes." At petitioner's 1981 trial, there was no psychiatric or psychological testimony introduced regarding the results of any mental health or intellectual examination of petitioner. Dr. Robert Rast, the sole mental health expert who testified at petitioner's trial, candidly admitted he had never examined petitioner, had not reviewed any of petitioner's mental health records, and knew absolutely nothing about petitioner's background or history.[127]

Dr. Rast did testify extensively on direct examination by the prosecution regarding the characteristics of persons labeled by mental health professionals as "sociopaths" or, to employ a more modern term, persons experiencing "anti-social personality disorder."[128] However, Dr. Rast did not testify petitioner was, in fact, such a person. On the contrary, the focus of Dr. Rast's testimony on direct examination was the issue of whether a hypothetical person who had engaged

---

habeas corpus proceeding for the purpose of urging his **Penry** claims herein. Moreover, petitioner does not allege that his trial counsel rendered ineffective assistance by failing to investigate, develop, or present at trial any additional evidence regarding petitioner's mental health.

[127] See S.F. Trial, Volume 6, testimony of Dr. Robert Rast, at pp. 209-10.

[128] **Id.** at pp. 201-09.

in many of the same types of violent, criminal activities the prosecution claimed petitioner had committed would be likely to continue to commit harmful acts to others in the future.[129]

It is true that, in the course of describing the characteristics of persons whom mental health professionals label as sociopathic, Dr. Rast did testify as follows:

> It's a person who does not learn from previous experience. It's one who has shallow affect. It's one who has no conscience or don't [sic] care, highly manipulative person, a con artist, self-centered, egocentric. These are the terms that apply to most sociopaths.[130]

However, Dr. Rast offered no testimony, and petitioner offered no evidence showing petitioner had ever been diagnosed as suffering from any intellectual defect or mental disease which prevented him from learning from his mistakes, as opposed to falling within Dr. Rast's description of a sociopathic personality who simply does not wish to learn

---

[129] **Id.** at pp. 208-09. Dr. Rast expressed the opinion that a person who had engaged in repeated acts of criminal violence, both in the free world and while in custody, could reasonably be expected to continue to commit harmful acts to others in the future, even if incarcerated. **Id.**

[130] **Id.** at p. 202. A moment later, Dr. Rast reiterated that the label "sociopath" is employed for persons who are self-centered and who do not learn from experience, and possess a shallow affect. **Id.** at pp. 203-04. However, Dr. Rast also testified that there is no biological aspect to anti-social personality disorder. **Id.** at p. 217.

from his experience because he enjoys manipulating other people.[131] Dr. Rast testified sociopathic personalities appear across all socioeconomic groups and at all intelligence levels.[132]

Moreover, rather than diagnosing petitioner as a sociopath, Dr. Rast's testimony established only that (1) the label sociopath or anti-social personality disorder is not a recognized mental disease but rather a characterization mental health professionals use for persons who engage in a wide variety of anti-social conduct, (2) many of the actions described by the prosecution in a hypothetical question which only vaguely tracked the evidence at petitioner's trial would have fallen within the broad parameters of conduct that is considered sociopathic, and (3) almost by definition, any violent, criminal conduct would be considered sociopathic in nature.[133]

As such, petitioner's suggestions that Dr. Rast testified petitioner suffers from some form of mental defect or disorder which prevents him from learning from his mistakes is simply. On the contrary, Dr. Rast's testimony did not focus on petitioner's mental health or intellectual capacity and did not attempt to identify any mental defect or disease suffered by petitioner. Rather, Dr. Rast's testimony, at best, supported the proposition that much of the criminal activity petitioner was accused of having engaged in constituted sociopathic conduct. Unlike the extensive expert testimony in **Penry**,

---

[131] See S.F. Trial, Volume 6, testimony of Dr. Robert Rast, at pp. 203-04, 225-26, and 236-37.

[132] **Id.** at p. 217 .

[133] **Id.** at pp. 202-09, 215, and 236.

there was no evidence introduced at either petitioner's trial or the evidentiary hearing on petitioner's state habeas corpus application showing petitioner has ever suffered from any mental disease or intellectual defect which prevents petitioner from learning from his mistakes. On the contrary, Dr. Rast's testimony regarding the label "sociopathic" that arguably could be applied to petitioner's conduct did not establish anything more than that some people choose not to conform their behavior to societal norms and that mental health professionals refer to these people as "sociopaths."

There was also no evidence introduced at petitioner's trial suggesting petitioner suffered from any intellectual defect, such as mental retardation, any organic brain damage, or any mental illness that prevented petitioner from conforming his behavior to societal norms or learning from his mistakes. Rather, the testimony regarding anti-social personality disorder merely recognized that persons who repeatedly engage in violent criminal activity are, by definition, considered to be anti-social. It is well-settled in this Circuit that evidence a capital murder defendant has been diagnosed as an anti-social personality does not warrant the type of supplemental instruction required by the holding in **Penry**.[134]

The defendant in **Penry** (1) was severely retarded, (2) had suffered brain damage, probably caused at birth but which may have been caused by beatings and multiple injuries to his brain at an early age, (3) was frequently beaten over the head with a belt when he was a child, (4) was routinely locked in his room without access to a toilet for long periods of time, (5) struggled for over a year to learn to print

---

[134] See **Demouchette v. Collins**, 972 F.2d at 653-54.

his name, and (6) as a youngster, was in and out of state schools and hospitals until age twelve. None of the evidence petitioner introduced at his 1981 trial was similar to the history of abuse the defendant in **Penry** experienced. Likewise, contrary to petitioner's assertions, there was no evidence introduced at petitioner's trial establishing petitioner suffered from either mental retardation, organic brain damage, a childhood characterized by extreme physical and emotional abuse, or any other condition that rendered petitioner unable to learn from his mistakes, as opposed to merely unwilling to do so.

The second problem with petitioner's **Penry** claims is petitioner's failure to introduce any evidence at his trial establishing that he experienced a deprived or abusive childhood similar to the extreme physical and emotional trauma inflicted on the defendant in **Penry**. On the contrary, petitioner's sister and family pastor both testified petitioner was raised in a religious, stable, middle-class family in which decent, good parents strictly enforced discipline. None of the witnesses at petitioner's trial mentioned any hint of physical or emotional abuse inflicted on petitioner by his father or older siblings of the nature involved in **Penry**. As explained above, a petitioner may not base a **Penry** claim on evidence that could have been but was not proffered at trial.[135]

---

[135] See **West v. Johnson**, 92 F.3d at 1405; **Briddle v. Scott**, 63 F.3d at 377; **Allridge v. Scott**, 41 F.3d at 223; **Crank v. Collins**, 19 F.3d at 176; **Anderson v. Collins**, 18 F.3d at 1214-15; **Calling v. Collins**, 998 F.2d at 275; **Barnard v. Collins**, 958 F.2d at 637; **Wilkerson v. Collins**, 950 F.2d at 1061; **May v. Collins**, 904 F.2d at 232; **DeLuna v. Lynaugh**, 890 F.2d at 722. Thus, petitioner is not entitled to rely upon evidence regarding his family

d. Analyzing the Purported **Penry** Evidence

(1) Alleged Inability to Learn

Petitioner's evidence that he arguably qualifies for labeling by mental health professionals as an anti-social personality did not require a **Penry** instruction, as that evidence could have been adequately considered by the jury in connection with the first special sentencing issue regarding deliberateness.[136] Furthermore, petitioner introduced no evidence at his trial establishing there was any causal connection between his antisocial personality disorder, assuming that petitioner actually qualified for that label, and his robbery and murder of John Ebbert.[137] As explained above, petitioner did not introduce any evidence at trial showing he suffers from mental retardation, organic brain damage, or any other mental defect preventing petitioner from conforming his conduct to the law.[138] The label of "antisocial

---

background or history of childhood abuse that was developed during his state habeas corpus proceeding for the purpose of urging his **Penry** claims herein.

[136] See **Demouchette v. Collins**, 972 F.2d at 653-54.

[137] See **Madden v. Collins**, 18 F.3d at 307-08 (holding that evidence the defendant suffered from an anti-social personality, dyslexia, and a troubled childhood was not relevant for **Penry** purposes absent a showing that the defendant's criminal conduct was attributable to same).

[138] Petitioner's Pastor, Norb Kabelitz, did mention at one point in his trial testimony that petitioner had difficulty learning to read and that this impacted upon the petitioner's self-image. See S.F. Trial, Volume 6,

personality disorder" petitioner apparently now claims does not have a biological basis, cuts across all intellectual levels, and is not evidence of diminished intellectual functioning.[139]

---

testimony of Norb Kabelitz, at p. 245. However, Pastor Kabelitz also testified petitioner was a well-behaved child who got along well with his peers and did not show any signs of being violent during his youth. **Id.** at pp. 250-53 and 257. Moreover, the trial testimony of petitioner's sister established that the petitioner was an average student who got along great with his classmates and managed to reach his senior year in high school before dropping out of school. **Id.** at Volume 6, testimony of Paquita Richardson, at pp. 131-32. Petitioner's sister also testified that there were no scars on the family and that the petitioner grew up in a typical middle class family atmosphere in a home with good and decent parents. **Id.** at p. 137.

[139] See S.F. Trial, Volume 6, testimony of Dr. Robert Rast, at p. 217 and 236. Dr. Rast testified that antisocial personality disorder is not a mental disorder. **Id.** at p. 236. The Court notes that many serial killers, including the infamous Ted Bundy, have been recognized as possessing above-average intelligence. Contrary to the implication underlying petitioner's "inability to learn from his mistakes" theory, proof a defendant has repeatedly engaged in violent, criminal conduct does not, as a matter of law, establish that the defendant suffers from some mental defect. Petitioner offered no evidence at either his trial or his state habeas corpus hearing to suggest otherwise.

(2) Allegedly Troubled Childhood

Petitioner's evidence regarding his purported troubled childhood also did not warrant a **Penry** instruction. Petitioner did not offer any evidence at trial showing he suffered from an abusive childhood. Even if he had, however, it is well-settled in this Circuit that evidence a defendant had a difficult, abusive, or traumatic childhood does not, standing alone, warrant a **Penry** instruction.[140] While a rational jury may infer that evidence of a long-standing, pattern of severe physical or emotional abuse inflicted upon a child of tender years renders that child less morally culpable for a violent crime, isolated episodes of violence or physical abuse inflicted upon a defendant do not, standing alone, constitute relevant mitigating evidence because there is no inherent nexus between such isolated episodes and the capital offense.[141] Thus, absent evidence showing that extreme, severe, or sustained mental or physical abuse was inflicted upon a capital murder defendant during childhood, a defendant asserting a history of child abuse in mitigation at sentencing must come forward with expert testimony or other evidence directly linking his or her capital offense to some form of physical, mental, or emotional abuse the defendant suffered as a child.[142] Petitioner failed to present any such evidence during his 1981 trial.

---

[140] See **Lackey v. Scott**, 28 F.3d at 489; **Madden v. Collins**, 18 F.3d at 307-08; **Russell v. Collins**, 998 F.2d at 1292-93; **Drew v. Collins**, 964 F.2d at 420-21; **Lincecum v. Collins**, 958 F.2d at 1282-84; **Barnard v. Collins**, 958 F.2d at 638-39.

[141] See **Russell v. Collins**, 998 F.2d at 1292-93.

[142] **Id.**

(3) Positive Character Traits and Talents

Petitioner's evidence of his religious devotion, voluntary service, kindness to others, artistic and poetic talent, and close family ties likewise could have been considered by petitioner's jury in the course of addressing the second Texas capital sentencing special issue regarding future dangerousness and did not require a special **Penry**-like instruction. It has long been settled in this Circuit that evidence of good character or positive traits and qualities, such as creative or artistic talent, does not require a **Penry** instruction.[143]

e. The "Chilling Effect" Argument

Insofar as petitioner argues the Texas capital sentencing scheme in place at the time of his trial "chilled" the ability of petitioner's trial counsel to develop and introduce evidence showing petitioner experienced a physically and emotionally abusive childhood, the same scheme did not prevent the defense lawyers in **Penry** from developing and introducing far more graphic evidence of abuse at trial in that case. The Fifth Circuit has repeatedly rejected this exact same argument.[144] The fact that a defense

---

[143] See **Nichols v. Scott**, 69 F.3d at 1267-68 & 1278; **Crank v. Collins**, 19 F.3d at 175; **James v. Collins**, 987 F.2d at 1121-22; **Jernigan v. Collins**, 980 F.2d at 295; **Holland v. Collins**, 962 F.2d at 419-20; **Black v. Collins**, 962 F.2d at 404-05; **Barnard v. Collins**, 958 F.2d at 638-39; **Graham v. Collins**, 950 F.2d at 1032-33; **Green v. Collins**, 947 F.2d at 1232.

[144] See **West v. Johnson**, 92 F.3d at 1406; **Woods v. Johnson**, 75 F.3d at 1033; **Briddle v. Scott**, 63 F.3d at

counsel's tactical decisions in a sentencing proceeding were shaped or channeled by the requirements of the statutory scheme under which the state proceeds does not interfere with defense counsel's independent strategic decision-making to the point defendant is denied effective assistance of counsel.[145]

Petitioner's trial counsel testified at the state habeas corpus hearing that his tactical decisions were based upon careful consideration of the Texas capital sentencing scheme as it existed in 1981.[146] Attorney Cazier testified he did not

---

377-78; **Mann v. Scott**, 41 F.3d 968, 980 (5th Cir. 1994), **cert. denied**, 514 U.S. 1117 (1995) ; **Lackey v. Scott**, 28 F.3d 486, 490 (5th Cir. 1994), **cert. denied**, 513 U.S. 1086 (1995); **Andrews v. Collins**, 21 F.3d 612, 630 (5th Cir. 1994), **cert. denied**, 513 U.S. 1114 (1995), **Crank v. Collins**, 19 F.3d at 176; **Black v. Collins**, 962 F.2d at 407; **May v. Collins**, 948 F.2d 162, 167 (5th Cir. 1991), **cert. denied**, 502 U.S. 1046 (1992).

[145] See **Black v. Collins**, 962 F.2d at 407; **May v. Collins**, 948 F.2d at 167-68.

[146] See State Habeas Hearing, Volume V of VIII, testimony of Allen Cazier, at pp. 514-613. Interestingly, attorney Cazier testified that, contrary to the testimony of the petitioner's brother Julio Richardson, attorney Cazier did meet with Julio, petitioner's parents, and other members of petitioner's family prior to petitioner's 1981 trial and that petitioner's family did not reveal petitioner had any history of physical or sexual abuse. **Id.** at pp. 517-19. In contrast, Julio Richardson testified at that same hearing that he did not meet with any of the petitioner's attorneys prior to petitioner's trial and that he was unaware

pursue the possibility of any history of child abuse on behalf of petitioner because neither petitioner nor petitioner's family made him aware of any such history and because any such evidence would have played into the prosecution's strategy of showing the petitioner was a sociopath.[147] Petitioner's trial counsel's strategic reasoning was sound, given the fact that petitioner was tried many years before the Supreme Court decided **Penry**. Under such circumstances, there was nothing professionally deficient about petitioner's trial counsel's strategic or tactical decision-making at the time of petitioner's 1981 trial.[148]

---

petitioner was charged with capital murder until after the petitioner was convicted. See State Habeas Hearing, Volume IV of VIII, at pp. 419-20.

[147] See State Habeas Hearing, Volume V of VIII, testimony of Allen Cazier, at pp. 519-20, 526-27, 530-32, 567-68, 576-77, 580, 597, 599, 601, 603, 605-06, and 610.

[148] See **Crane v. Johnson**, 178 F.3d 309, 313-14 (5th Cir.), **cert. denied**, 120 S. Ct. 369 (1999)(holding that trial counsel's failure to develop and present purportedly mitigating evidence regarding defendant's mental impairment was reasonable strategic decision where trial counsel investigated defendant's mental impairment and concluded that evidence of same would defeat trial strategy of attempting to obtain a favorable jury response to future dangerousness issue and might have opened door to harmful evidence regarding the defendant's rages and violent tendencies); **Rector v. Johnson**, 120 F.3d at 564 (holding that failure to present mitigating evidence is not a per se showing of ineffective assistance if based on well informed, strategic decisions); **Wilkerson v. Collins**, 950

f. **Teague** Foreclosure

Neither the Supreme Court nor the Fifth Circuit have extended the holding in **Penry** to reach any of the purportedly mitigating evidence petitioner actually introduced at his 1981 capital murder trial. Likewise, the Fifth Circuit has repeatedly rejected the "chilling effect" argument petitioner presents here and the Supreme Court has repeatedly denied certiorari when the Fifth Circuit has done so. Under such circumstances, adopting any of the contentions petitioner raises in his second group of claims herein would necessarily require this court to adopt a new rule for purposes of **Teague**.

3. AEDPA Review

As explained above, the Supreme Court's and Fifth Circuit's subsequent opinions have effectively circumscribed the holding in **Penry** to an extremely narrow class of cases involving evidence of a capital murder defendant's mental retardation, organic brain damage, and severe emotional and physical abuse sufficient to render a defendant intellectually incapable of appreciating the wrongfulness of his own criminal conduct or conforming his conduct to the strictures of the law. Petitioner introduced no evidence before the jury at trial which falls near the parameters of a legitimate **Penry** claim.[149] The Court's adoption of petitioner's "chilling effect"

F.2d at 1065(holding the same); **Garland v. Maggio**, 717 F.2d 199, 206 (5th Cir. 1983)("A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness.")

[149] The petitioner's rambling testimony during the hearing on the issue of whether Victoria Franklin was his common

argument is clearly barred by **Teague**. Under such circumstances, the state court's rejection of petitioner's **Penry** claims and quasi-**Penry** "chilling effect" claim was neither (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore, petitioner's second group of claims do not warrant federal habeas relief under the AEDPA.

4. Conclusions

Regardless of whether this Court conducts a de novo review of petitioner's second group of claims or employs the AEDPA's standard, petitioner is entitled to no relief based on those claims. Furthermore, the claims raised in petitioner's

---

law wife suggested petitioner suffers from delusions of credibility. See S.F. Trial, Volume 5, testimony of Miguel Richardson, at pp. 146-64. During his testimony at that hearing outside the jury's presence, the petitioner (1) claimed that he would never lie under oath, (2) admitted that he had twice filed false affidavits in the Colorado courts when he was fighting extradition attesting to the fact that he was unmarried, (3) claimed that he filed those false affidavits because he was interested in "catching" female attorneys who were representing him at the time, but (4) he was legally married to Victoria Franklin throughout this entire time frame. **Id.** at pp. 152-57. However, the jury was not permitted to witness the petitioner's performance, in which he also claimed to be able to turn any woman into a prostitute simply by talking to her. **Id.** at p. 163.

second group of claims seek the expansion of existing legal doctrines beyond their current parameters such that those claims are all foreclosed by the non-retroactivity doctrine of **Teague**. Existing Fifth Circuit and Supreme Court case law regarding **Penry** claims is so well-settled in opposition to petitioner's arguments that petitioner's second group of claims do not warrant a Certificate of Appealability.

C. Quasi-**Witherspoon** Claim

1. The Claim

In his third claim for relief herein, petitioner complains that during the voir dire portion of trial, the state trial court erroneously excluded a prospective juror named William Graves Noble who had allegedly qualified under the Supreme Court's holding in **Witherspoon v. Illinois** and that the Texas Court of Criminal Appeals erred when, in the course of petitioner's direct appeal, that court held the trial court's error in excusing venire member Noble was harmless.[150]

2. De Novo Review

a. A Note on **Witherspoon** and Its Progeny

In **Witherspoon v. Illinois**,[151] the Supreme Court held that prospective jurors may not be excused from sitting on a capital jury simply because they voiced general objections to

---

[150] See Amended Petition, at pp. 40-52; and Reply Memorandum, at pp. 11-13.

[151] 391 U.S. 510, 521-23 (1968).

the death penalty or expressed conscientious or religious scruples against its infliction. Rather, the Supreme Court held as follows:

> The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty regardless of the facts and circumstances that might emerge in the course of the proceedings.[152]

In **Wainwright v. Witt**, the Supreme Court clarified its holding in **Witherspoon**, holding the proper inquiry when faced with a venire member who expresses personal, conscientious, or religious views on capital punishment is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[153] In **Witt**, the Supreme Court also emphasized that considerable deference is to be given the trial court's firsthand evaluation of the potential juror's demeanor and that no particular magical incantation or word choice need necessarily be followed in interrogating the potential juror in this regard.[154] In **Gray v. Mississippi**, the

---

[152] **Witherspoon v. Illinois**, 391 U.S. at 522 n.21.

[153] **Wainwright v. Witt**, 469 U.S. 412, 424 (1985); accord **McFadden v. Johnson**, 166 F.3d 757, 760 (5th Cir.), **cert. denied**, 120 S. Ct. 369 (1999); **Fuller v. Johnson**, 114 F.3d 491, 500 (5th Cir.), **cert. denied**, 522 U.S. 963 (1997).

[154] See **Wainwright v. Witt**, 469 U.S. at 430-35.

Supreme Court held the erroneous dismissal of a potential juror in violation of **Witherspoon** was not subject to harmless error analysis.[155]

b. Setting the Record Straight

Petitioner argues the trial court's exclusion of venire member Noble violated the rule in **Witherspoon** and the Texas Court of Criminal Appeals erred when it held that error to be harmless under applicable Texas law. The trial court's exclusion of Mr. Noble had nothing to do with his personal views on capital punishment. Rather, the trial court excluded Mr. Noble because he forthrightly volunteered that he had been exposed to considerable pretrial publicity about petitioner's case and had already formed an opinion on the issue of guilt or innocence. Thus, the petitioner's reliance on **Witherspoon** is misplaced.

This Court's independent review of the voir dire examination of William Graves Noble reveals the state trial court excused Mr. Noble not because Mr. Noble expressed personal reservations about his ability to vote to impose the death penalty but, rather, because Mr. Noble volunteered he had been exposed to substantial pretrial publicity regarding petitioner's case and had already formed an opinion of the petitioner's guilt or innocence. More specifically, the rather brief voir dire examination of Mr. Noble consisted of a general series of questions, followed by several exchanges in which Mr. Noble indicated he had conscientious scruples against the death penalty and he was "irrevocably committed before trial to automatically voting" against the death penalty

---

[155] See **Gray v. Mississippi**, 481 U.S. 648, 668 (1987); **Fuller v. Johnson**, 114 F.3d at 500.

regardless of the facts and circumstances.[156] At that point, the prosecution moved to excuse Mr. Noble for cause. However, the trial court then conducted further questioning during which Mr. Noble indicated that while he would have to wrestle long and hard with his conscience, he believed he could set aside his personal views and follow his oath as a juror to return a verdict based upon the court's instructions and the evidence.[157] The trial court then denied the State's challenge for cause and the prosecution resumed its interrogation, at which point, the following exchange occurred:

> Q. I'm not asking you to not contradict yourself or to contradict yourself, I'm asking you just to tell me just as honestly as you can so that I will know whether or not you can sit here as a fair and unbiased juror and do the job that the jurors must do?
> A. If I were a juror I would try to serve to the best of my ability. That's what I can say.
> Q. All right.
> A. You used a couple of words there, bias and impartial that I think you might want to pursue.
> Q. Well, are you biased in some manner about this case?
> A. Well, I have read quite a bit about it. And I feel that I have already prejudged the case. I mean I take all the newspapers. I'm a

---

[156] See S.F. Trial, Volume 2, voir dire examination of William Graves Noble, at pp. 147-52.

[157] **Id.** at pp. 152-54.

journalist by profession and I know - I don't disregard what I see in the paper.
THE COURT: Have you already formed an opinion as to the guilt or innocence?
THE WITNESS: Yes, Your Honor. I think it's only fair to say that I have formed an opinion.
THE COURT: You will be excused Mr. Noble. You can return to the Central Jury Room. They will discharge you from there.
MR. CAZIER: If the Court please, the Defendant objects to Mr. Noble being excused, the entire predicate not having been laid for his excuse.
THE COURT: You are excused.
THE COURT: The statute provides if the juror states from hearsay or otherwise he has already formed an opinion as to the guilt or innocence of the Defendant there will be no further questioning.
MR. CAZIER: Does it say one more sentence?[158]

Petitioner argues the trial court's purportedly erroneous act, excusing a member of petitioner's jury venire based upon the trial court's perception that the venire member had already formed an opinion regarding the petitioner's guilt, somehow implicates the Supreme Court's holding in **Witherspoon**. This Court finds nothing in the record from the voir dire examination of Mr. Noble that would indicate the trial court's exclusion of Mr. Noble had anything to do with the rule or holding in **Witherspoon**. The trial court excluded Mr. Noble because it perceived Mr. Noble's forthright action

---

[158] **Id.** at pp. 155-57.

in volunteering he had already prejudged the defendant's guilt or innocence amply demonstrated a bias or prejudice that could not be cured through further questioning.

On direct appeal from his conviction, petitioner complained about the exclusion of Mr. Noble. The Texas Court of Criminal Appeals determined the trial judge had acted prematurely under applicable state law, which at that time required examination of a potential juror who expressed personal prejudice on the issue of guilt or innocence to ascertain whether the juror's prejudice would influence his verdict.[159] However, the Texas Court of Criminal Appeals went on to conclude the trial court's error in excluding Mr. Noble was harmless under applicable state law because the prosecution had not exhausted its peremptory challenges.[160] Insofar as petitioner asks this Court to review the state trial court's compliance with state procedural rules or the Texas Court of Criminal Appeals' application of state harmless error principles, for the reasons set forth in Section II.B. above, those complaints raise only matters of state law and do not furnish a basis for federal habeas corpus relief.

c. **Teague** Foreclosure

Petitioner argues the trial court's exclusion of Mr. Noble violated the holding in **Witherspoon** and could never be harmless.

Petitioner's contention fails because what he urges this Court to do in his third claim for relief is to adopt a new rule of criminal procedure, to wit, that the exclusion of any

---

[159] See **Richardson v. State**, 744 S.W.2d at 68.

[160] See **Richardson v. State**, 744 S.W.2d at 69-71.

Witherspoon-qualified juror for any reason is impermissible. There is no established support for such a proposition in the case law of this nation and there was none at the time petitioner's conviction became final. Nothing in the Constitution guarantees that a capital murder defendant is entitled to insist upon a jury made up of citizens who have already prejudged the issue of guilt or innocence. Nothing in the Constitution prohibited the trial court's exclusion of a potential juror who expressed a firm opinion he had already prejudged the question of guilt or innocence. Thus, the principles on which petitioner relies in his third ground for relief are foreclosed by the rule in **Teague**.

d. Federal Harmless Error Analysis

The trial court excluded Mr. Noble because he testified (1) he had been exposed to extensive pretrial publicity about the case, (2) as a professional journalist, he did not disregard what he read in the papers, and (3) he had already formed an opinion as to petitioner's guilt or innocence. Under the circumstances of this case, especially the overwhelming evidence of petitioner's guilt, the deliberateness of petitioner's murder of Ebbert, and petitioner's propensity for future violence, the trial court's exclusion of Mr. Noble most certainly did not have a substantial and injurious effect or influence on the jury's verdict at either stage of petitioner's trial.[161]

e. No Merit

---

[161] Because there was no **Witherspoon** issue raised by the trial court's exclusion of Mr. Noble, the holding in **Gray v. Mississippi** is inapposite to this cause.

Setting aside the harmless error and **Teague** barriers to relief under petitioner's third claim herein, this Court concludes the exclusion of Mr. Noble did not violate any recognized federal constitutional right possessed by petitioner.

The Sixth Amendment guarantees a criminal defendant the right to an impartial jury.[162] Generally, where a party seeks to exclude a venire member because of bias, that party must demonstrate through questioning that the potential juror lacks impartiality.[163] Here, however, the trial court sua sponte made a finding of partiality and excused Mr. Noble. Even under pre-AEDPA case law, a trial judge's finding of bias during voir dire was a factual determination entitled to the deference and same presumption of correctness on collateral review owed other state court fact findings under former Section 2254 (d).[164]

Having reviewed the entire voir dire examination of Mr. Noble, this Court finds no reason to second-guess the trial court's implicit finding of bias on the part of Mr. Noble. Significantly, Mr. Noble conscientiously volunteered he was biased and had prejudged the issue of petitioner's guilt or innocence. Mr. Noble, a journalist, also expressed

---

[162] See **Morgan v. Illinois**, 504 U.S. 719, 727 (1992); **United States v. Webster**, 162 F.3d 308, 341 (5th Cir. 1998), **cert. denied**, 120 S. Ct. 83 (1999).

[163] **Wainwright v. Witt**, 469 U.S. 412, 424 (1985); **Fuller v. Johnson**, 114 F.3d at 499-500.

[164] See **Wainwright v. Witt**, 469 U.S. at 426-27; **Fuller v. Johnson**, 114 F.3d at 500-01; **Mann v. Scott**, 41 F.3d at 980.

reservations about his ability to disregard what he had read about the case, which certainly warranted concern on the trial court's part about Mr. Noble's ability to render a verdict based solely on the evidence introduced at trial. As the Supreme Court noted in **Witt**:

> the quest is for jurors who will conscientiously apply the law and find the facts. That is what an "impartial" jury consists of, and we do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor.[165]

Having reviewed the voir dire of Mr. Noble, this Court can find no basis for questioning the trial court's implicit finding of bias or for concluding that the trial court's exclusion of Mr. Noble violated petitioner's constitutional right to have his case determined by a fair and impartial jury. Petitioner has not identified any juror who actually served on his petit jury whom petitioner argues was biased or not impartial. Therefore, petitioner's third claim presents no basis for federal habeas corpus relief.

3. AEDPA Review

Petitioner's third claim for relief urges the adoption of a new rule of federal criminal procedure. Furthermore, any error in connection with the exclusion of Mr. Noble based upon his confession of having prejudged the issue of guilt or innocence was harmless. Under these circumstances, the state court's rejection of petitioner's third claim for relief was

---

[165] **Wainwright v. Witt**, 469 U.S. at 423.

neither (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore, petitioner's third claim does not warrant federal habeas relief under the AEDPA.

4. Conclusions

Petitioner's third claim for relief is premised on an assumption the trial court excluded Mr. Noble because of his views on the death penalty. From that initial assumption, petitioner argues against the Texas Court of Criminal Appeals' application of state procedural and harmless error principles, neither of which rise to the level of federal constitutional issues in this context. Petitioner's constitutional right to an impartial jury was not violated by the trial court's exclusion of Mr. Noble. Petitioner's suggestion that this Court adopt a new rule barring exclusion of any **Witherspoon**-qualified juror is foreclosed by the rule in **Teague**. Any error with regard to the exclusion of Mr Noble was harmless under the appropriate federal constitutional standard. Under such circumstances, petitioner's third claim warrants neither federal habeas corpus relief nor a Certificate of Appealability.

D. Lethal Injection in Texas and the Eighth Amendment

1. The Claim

In his fourth ground for relief, petitioner argues the method of lethal injection employed by the State of Texas violates the Eighth Amendment.[166]

2. De Novo Review

a. The Lack of Evidence Supporting this Claim

Petitioner offered the state courts no evidence regarding the actual means by which lethal injection is administered in Texas. Likewise, petitioner asks this Court for an evidentiary hearing to develop that issue without alleging any specific facts showing the method actually employed by the State of Texas is in any way defective. Petitioner spent considerable time and energy during the evidentiary hearing held in petitioner's state habeas corpus proceeding challenging the lack of written guidelines and written procedures for carrying out lethal injections in Texas. However, petitioner offered no evidence as to precisely how lethal injections are actually carried out in this State.

This Court carefully reviewed all of the testimony on this subject from petitioner's state habeas corpus hearing.

---

[166] See Amended Petition at pp. 52-69; Reply Memorandum at p. 14.

(1) Testimony of Dr. Brunner

Dr. Edward Albert Brunner, a physician and professor of anesthesiology, testified extensively at petitioner's state habeas corpus hearing that the limited written materials available to him regarding the precise manner employed by Texas prison officials to carry out execution by lethal injection were insufficiently detailed to assure that either (1) the prisoner would be properly catheterized, (2) the proper doses of medications would be employed in the appropriate sequence and with appropriate intervals in between their administration to fully anesthetize the prisoner before the injection of the two medications which paralyzed the heart and lungs, or (3) the persons actually installing the intravenous catheter and administering the lethal medications were qualified and adequately trained to do so.[167] However, Dr. Brunner admitted he had never witnessed an execution by lethal injection in Texas, or elsewhere, and he had no personal knowledge regarding either the qualifications of the persons who carry out lethal injections in Texas, the procedures actually employed to carry out lethal injections in Texas, or the steps taken in Texas to insure a prisoner is properly catheterized and anesthetized before the flow of life terminating medications begins.[168]

---

[167] See Statement of Facts or verbatim transcription of the testimony from the evidentiary hearing in petitioner's state habeas corpus proceeding (henceforth "State Habeas-Hearing"), Volume III of VIII, testimony of Dr. Edward Albert Brunner, at pp. 27-156.

[168] See State Habeas Hearing, Volume III of VIII, testimony of Dr. Edward Albert Brunner, at pp. 115-48.

Dr. Brunner testified that unless great care was taken to insure (1) the prisoner is properly catheterized, i.e., the intravenous needle is properly installed in a vein in such a manner as to allow the unimpeded flow of medications into the circulatory system, (2) an adequate interval has passed since the prisoner's last meal, (3) a proper dose of sodium thiopental or sodium pentothal is employed to adequately anesthetize the prisoner, (4) the catheter remains clear and open, and (5) the patient is actually unconscious before the pancuronium bromide and potassium chloride are injected, the prisoner would experience excruciating pain, tissue necrosis, and aspiration of stomach contents with attendant asphyxiation.[169] Dr. Brunner also discussed at great length (1) the difficulty in properly installing an intravenous catheter and the considerable training and skill required to do so efficiently, (2) the difficulty in properly catheterizing a patient who has been an intravenous drug abuser, and (3) the high degree of variability in determining the dose of sodium pentothal necessary to anesthetize a patient.[170]

However, Dr. Brunner also admitted (1) it was quite possible the potential problems he identified are being avoided in Texas during lethal injections, (2) he did not know the actual sequence of the three drugs employed in Texas to carry out lethal injections, (3) the drugs used in Texas to carry out lethal injections are appropriate for that purpose from a pharmacological standpoint, (4) it is possible to introduce through a proper intravenous catheter a dose of sodium pentothal of sufficient volume and strength to anesthetize

---

[169] **Id.** at pp. 43-51, 57, 74-76, 87-88, 94-95, 145, 150-51, and 154.

[170] **Id.** at pp. 35-37, 40, 44-53, 55, and 92.

anyone, (5) it is not necessary that a physician install an intravenous catheter, (6) a person properly anesthetized with sodium pentothal would not feel any pain when the other drugs were injected, provided the person were properly monitored through either an EEG or a check of eye reflexes to insure that full anesthesia had been obtained, and (7) from his personal examination of the petitioner's arms in open court, it did not appear petitioner has suffered any vein scarring in his arms typical of intravenous drug abusers that might impede a lethal injection in petitioner's case.[171]

(2) Testimony of Dr. Denno

Dr. Deborah W. Denno, a Ph.D. criminologist and law professor, testified that she had undertaken a study of what she termed "botched" executions throughout the United States, which she defined as executions that involved technical mishaps that are unforeseeable or unpredictable and can lead to prolonged pain and suffering.[172] Dr. Denno explained she had never witnessed an execution and that her research consisted of studying newspaper accounts of executions and interviewing eyewitnesses.[173] Based upon her research, Dr. Denno testified she had identified eleven "botched" executions in Texas since the Supreme Court's opinion in **Jurek** and proceeded to discuss each of those in detail and to identify why she believed each such execution

---

[171] **Id.** at pp. 122, 131-33, 135-37, 141, 143, and 145-46.

[172] See State Habeas Hearing, Volume IV of VIII, testimony of Dr. Deborah W. Denno, at pp. 263-397. Dr. Denno's explanation of what she considered to be "botched" executions appears at pp. 279-80 and 365-66.

[173] **Id.** at pp. 284, 338, 341, 364, and 391-93.

fell within the scope of her definition of "botched."[174] Dr. Denno concluded that, because of the lack of a proper written protocol, the method of lethal injection employed in Texas poses a substantial and unnecessary risk of extreme pain and prolonged suffering.[175]

On cross-examination however, Dr. Denno admitted she had made no effort to obtain autopsy records on any of these eleven individuals or to otherwise ascertain whether any of those persons' bodies showed any post-mortem indications of having aspirated stomach contents, tissue necrosis, or any of the other possible problems Dr. Brunner had identified in his testimony the previous day.[176] Dr. Denno also admitted her definition of the term "botched" was so broad as to include any execution in which, because of the prisoner's physical condition, including a history of intravenous drug use, personnel employed by the State had difficulty locating and properly installing an intravenous catheter.[177] In fact, this Court's independent review of Dr. Denno's testimony reveals that seven of the eleven Texas executions identified by Dr. Denno were characterized by her as such because of the difficulty State personnel experienced in finding a suitable vein in which to place an intravenous catheter.[178] In only

---

[174] **Id.** at pp. 306-27.

[175] **Id.** at pp. 293, 301, and 393-94.

[176] **Id.** at pp. 386, 388, and 391-93.

[177] **Id.** at pp. 365-66 and 379.

[178] **Id.** at pp. 304-27. Dr. Denno identified the following persons as victims of what she termed "botched" Texas executions: Charlie Brooks, Jr., James David Autry, Thomas Andy Barefoot, Stephen Peter Morin, Randy L.

three instances, covering a period in which the State of Texas conducted more than one hundred executions, did Dr. Denno testify she had found any reports of any violent physical reactions by the person being executed via lethal injection in

---

Woolls, Elliot Rod Johnson, Raymond Landry, Stephen McCoy, Billy White, Justin May, and Ronald Allridge. Of these, Dr. Denno testified that she identified the executions of Brooks, Morin, Woolls, Johnson, Landry, White, and Allridge as "botched" simply because of the delay State employees experienced in either finding or properly installing an intravenous catheter. **Id.** However, she admitted that all of these persons had histories of intravenous drug abuse. **Id.** at pp. 304-27, 376, and 379. Dr. Denno also mentioned that during the execution of Landry, whom she said was so muscular that he was nicknamed "Popeye," Landry's vein "blew out" and State personnel had to re-install the intravenous catheter. **Id.** at pp. 315-17. Dr. Denno listed an eighth execution, i.e., that of Autry, as "botched" because a clogged tube leading to Autry's arm resulted in the execution taking ten minutes. **Id.** at pp. 306-07. Dr. Denno also identified time factors from the instant the drugs began flowing in several other executions as indications to her of mechanical problems; more specifically, those of Brooks - seven minutes, Autry - ten minutes, White - nine minutes, May - nine minutes, and Allridge - nine minutes. This Court notes that Dr. Brunner testified that in his opinion, it would require from four to five minutes for an adequate quantity of sodium pentothal to flow into a person's vein before that person would be fully anesthetized. See State Habeas Hearing. Volume III of VII, testimony of Dr. Edward Albert Brunner at pp. 150-51.

Texas.[179] In none of those instances did she testify that any objectively verifiable evidence existed showing those persons had suffered pain as a result of any mechanical failure or negligence with regard to either the installation of the intravenous catheter or the dose of medication employed during the execution.[180]

Aside from her review of newspaper accounts of Texas executions, Dr. Denno admitted (1) she had no personal knowledge regarding how lethal injections are administered in Texas and (2) she did not purport to possess any expertise regarding how the State of Texas should go about drafting a protocol of the type she and Dr. Brunner said the State of Texas had not yet published in written form.[181]

---

[179] Those were the executions of Barefoot, McCoy, and May.

[180] Dr. Denno explained that one or more of the unnamed witnesses to McCoy's execution upon whom she relied had attributed McCoy's apparently violent reaction to the drugs as a result of weak dosage. See State Habeas Hearing, Volume IV of VIII, testimony of Dr. Deborah W. Denno at p. 319. However, Dr. Denno offered no other evidentiary basis to support that speculative conclusion.

[181] See **Id.** at pp. 396-97:

I would say, first of all, and I'm not an expert on how an individual should be executed, and that the State of Texas should get experts who know something. Because from what I can tell, they haven't done that. There is nothing to suggest that they have gone to medical experts to have them devise their protocol. And I would suggest that they start going to somebody who is an expert and not somebody like myself.

b. No Merit

After conducting a review of the testimony of Dr. Brunner and Dr. Denno, it is clear to that neither of these persons, nor any of the other witnesses petitioner presented during the extensive evidentiary hearing held in petitioner's state habeas corpus proceeding, possessed any personal knowledge regarding how lethal injections are administered in Texas. Furthermore, it is also clear that, aside from their expressions of personal opposition to the death penalty in general, the principal complaint these two experts voiced was not with the method of lethal injection actually employed in Texas. Rather, Dr. Brunner and Dr. Denno focused on the lack of detailed, written procedures or guidelines (or a "protocol") for carrying out the intricate steps of ensuring proper installation of an intravenous catheter, proper anesthetization, and proper flow of the drugs employed to execute those convicted of capital murder and sentenced to death in Texas. Aside from the lack of written procedures, neither of these witnesses identified any defect in the method of lethal injection employed in Texas. Both admitted they knew nothing about how such executions are carried out in Texas. On the substance of their testimony, petitioner presents his "as applied" constitutional challenge.

Petitioner identifies no authority to support his premise that the Constitution mandates a method of execution be either completely painless or instantaneous. Likewise, nothing in the Eighth Amendment requires that execution via lethal injection be conducted in a manner that is completely free from even the possibility of negligently inflicted pain.

The Fifth Circuit has specifically approved the use of lethal injection as a means of executing persons convicted of

capital murder and sentenced to death.[182] Because petitioner failed to introduce any evidence showing how lethal injections are actually carried out in Texas, his speculation that human error in connection with the installation of intravenous catheters will lead to prolonging or adding to the pain associated with death by lethal injection does not furnish a basis for federal habeas corpus relief. Moreover, petitioner's failure to allege any specific facts showing any of the possible types of errors about which Dr. Brunner testified actually occurred in Texas lethal injections or are likely to occur during petitioner's execution undermines petitioner's fourth claim for relief herein. There is nothing uncertain about the manner in which petitioner will be executed because human beings must necessarily carry out that procedure. Nor does petitioner offer any evidentiary basis for concluding that the method of lethal injection employed in Texas poses an unreasonable risk of prolonged pain.[183] In fact, at the

---

[182] See **Kelly v. Lynaugh**, 862 F.2d 1126, 1135 (5th Cir. 1988), **cert. denied**, 492 U.S. 925 (1989); **Woolls v. McCotter**, 798 F.2d 695, 697-98 (5th Cir.), **cert. denied**, 478 U.S. 1031 (1986).

[183] Contrary to the implications contained in petitioner's briefing in this cause, Dr. Denno was able to identify only four instances of possible human error by Texas officials, resulting in observable, physical reaction by the person being executed. Petitioner's complaints about delays resulting from difficulty in finding suitable veins in long-term intravenous drug users does not begin to show negligence on the part of state officials. Dr. Brunner testified at length about the inherent difficulty in properly installing an intravenous catheter in such persons. The simple fact is the petitioner managed to identify only three or four instances of possible human error occurring in the

extensive evidentiary hearing held in petitioner's state habeas corpus proceeding, petitioner failed to introduce any testimony regarding precisely how lethal injections are carried out in Texas.[184]

Petitioner asks this Court to adopt a new rule prohibiting lethal injection in Texas unless and until detailed, written guidelines or a "protocol" for lethal injection is adopted and published by the State. However, the constitutional prohibition against cruel and unusual punishment has never been construed as a requirement that such guidelines exist. Petitioner premises his fourth claim for relief on an assertion that "as currently administered," the method of lethal injection employed by the State of Texas violates the Eighth Amendment. However, petitioner presented no evidence of same to the state courts and has

---

course of Texas' execution of more than one hundred prisoners. Far from establishing any deliberate indifference to the welfare of condemned Texas prisoners, this small percentage of possible errors indicates that Texas has undertaken an extremely successful effort to avoid the types of horrors Dr. Brunner described as inherent in execution by lethal injection execution.

[184] As explained above, both of petitioner's expert witnesses confessed unfamiliarity with regard to the actual manner in which the State of Texas conducts lethal injections. While petitioner's counsel made numerous representations early on during that hearing that the warden of the Walls Unit and other persons possessing personal knowledge of such matters would be called to testify, petitioner failed to call or present any such witnesses during that hearing.

presented this Court with no fact-specific allegations establishing same in this cause. Speculation based on anecdotal hearsay are no substitutes for hard evidence.[185] Petitioner has not alleged any specific facts showing there is any inherent defect in the manner in which lethal injections are currently administered in Texas.

Nothing in the Constitution requires the State of Texas to execute a prisoner only in a manner that is completely painless or instantaneous or in a manner that is consistent with a written protocol. From a practical standpoint, the written protocol petitioner seeks would not protect him or any other Texas death row inmate from the type of human error inherent in the process of installing an intravenous catheter about which Dr. Brunner focused most of his testimony. Petitioner has failed to establish the failure of state officials to

---

[185] Petitioner offered the state courts no evidence regarding the actual qualifications of the persons who install intravenous catheters in persons immediately before executions at the Walls Unit. Petitioner offered the state courts no evidence regarding the procedures actually followed by such persons in the course of installing those catheters. Likewise, petitioner offered the state courts no evidence regarding the sequence of the administration of the three drugs employed in Texas lethal injections, the manner of calculating dosages, or the steps, if any, undertaken to ensure proper anesthesia of the prisoner with sodium pentothal before either the pancuronium bromide or potassium chloride begin to flow into the prisoner's vein. In fact, the petitioner offered the state courts no testimony or other, non-hearsay evidence showing what, if anything, is done by State employees before, during, or after a Texas lethal injection.

adopt a protocol of the type he now demands rises to the level of deliberate indifference to the safety of condemned Texas capital murderers.

c. **Teague** Foreclosure

Petitioner cites no Supreme Court or other case law holding a prisoner facing a capital sentence possesses a federal constitutional right to have his execution carried out pursuant to detailed, written, step-by-step guidelines or procedures. This Court's independent research disclosed no support for such a proposition. For that reason, petitioner's fourth claim is also barred by the non-retroactivity doctrine in **Teague**.

3. AEDPA Review

Petitioner's fourth claim for relief seeks the adoption of a new principle which is foreclosed by the doctrine announced in **Teague**. Under such circumstances, the state court's rejection of petitioner's fourth claim for relief was neither (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore, petitioner's fourth claim does not warrant federal habeas relief under the AEDPA.

4. Conclusions

Petitioner's fourth claim for relief is without evidentiary foundation. Petitioner's constitutional right to remain free from the infliction of cruel and unusual punishment is not a guarantee he will be executed in a manner that is either instantaneous or painless. The petitioner's

suggestion this Court adopt a new rule requiring such is foreclosed by the rule in **Teague**. Under such circumstances, petitioner's fourth claim warrants neither federal habeas corpus relief nor a Certificate of Appealability.[186]

E. Dr. Rast's Testimony and Ineffective Assistance

1. The Claims

In his fifth claim for relief, petitioner argues the trial court's admission of the "surprise" testimony of a psychologist, Dr. Robert Rast, violated petitioner's due process rights and his Sixth Amendment right to effective assistance of counsel by depriving petitioner's trial counsel of an opportunity to adequately cross-examine that witness.[187]

2. De Novo Review

a. No Merit

(1) The Facts

On September 16, 1981, on the first day of the punishment phase of petitioner's trial, the prosecution announced it had previously notified the defense it intended to call two mental health experts to testify, namely a Dr. Grigson and a Dr. Schroeder, but would, in fact, only call

---

[186] See **Woolls v. McCotter**, 798 F.2d at 698 (holding that complaints about lethal injection via sodium pentothal did not warrant a Certificate of Probable Cause, i.e., the statutory predecessor to a CoA).

[187] See Amended Petition at pp. 69-73; Reply Memorandum at pp. 15-16.

Dr. Grigson.[188] The defense indicated they had expected Dr. Grigson to testify and had previously obtained issuance of a subpoena for Dr. Grigson's income tax returns.[189] However, later, the prosecution informed the trial court and defense counsel that a Dr. Rast would be testifying in lieu of Dr. Grigson. When the prosecution called Dr. Rast to testify at the punishment phase of trial, defense counsel objected and alleged surprise explaining he was prepared to cross-examine Dr. Grigson and Dr. Schroeder, but knew nothing about Dr. Rast.[190] After a hearing outside the jury's presence, the trial court overruled defense counsel's objections and held that Dr. Rast, who had never examined petitioner or petitioner's mental health records, could testify as an expert witness.[191] Significantly, the trial court invited defense counsel to either move for a continuance or identify any area of potential cross-examination which required additional research but defense counsel chose not to pursue either of those two options.[192]

Thereafter, Dr. Rast testified in the manner outlined in Section III.B.2.c above.[193] Petitioner's trial counsel cross-examined Dr. Rast extensively and obtained admissions from

---

[188] See S.F. Trial, Volume 6 at pp. 10-13.

[189] **Id.**

[190] **Id.** at pp. 184-99.

[191] **Id.**

[192] **Id.**

[193] See S.F. Trial, Volume 6, testimony of Dr. Robert Rast at pp. 199-237.

this witness that antisocial personality disorder ("ASPD") is not a mental illness, the more flagrant aspects of ASPD tend to diminish over time as the patient ages, the petitioner is not mentally ill, studies by mental health experts had repeatedly found great difficulty by professionals in predicting future violence among incarcerated persons, and there are no reliable criteria for psychiatric predictions of long term future criminal behavior.[194]

(2) Due Process Claim .

Insofar as petitioner's fifth claim herein is premised on due process principles, his contentions fail to warrant federal habeas corpus relief.

It is well-settled law in this Circuit that in reviewing state evidentiary rulings in habeas corpus petitions, a federal court does not sit as a super state supreme court to review error under state law.[195] A federal court may grant habeas relief based on an erroneous state court evidentiary ruling only if the ruling also violates a specific federal constitutional right or renders the petitioner's trial fundamentally unfair.[196]

---

[194] **Id.** at pp. 215, 217, 221-22, 225-27, 20-31, 234, and 236.

[195] **Bridge v. Lynaugh**, 838 F.2d 770, 772 (5th Cir. 1988).

[196] **Johnson v. Puckett**, 176 F.3d 809, 820 (5th Cir. 1999); **Little v. Johnson**, 162 F.3d 855, 860 (5th Cir. 1998); **Green v. Johnson**, 160 F.3d at 1047; **Lucas v. Johnson**, 132 F.3d at 1079; **Gochicoa v. Johnson**, 118 F.3d 440, 446 (5th Cir. 1997), **cert. denied**, 522 U.S. 440 (1998); **Cupit v. Whitley**, 28 F.3d 532, 536 (5th Cir. 1994), **cert. denied**, 513 U.S. 1163 (1995); **Andrade v. McCotter**, 805 F.2d 1190, 1193 (5th Cir. 1986).

"A state court's evidentiary rulings present cognizable habeas claims only if they run afoul of a specific constitutional right or render the petitioner's trial fundamentally unfair."[197] When a federal court reviews state court evidentiary rulings on a petition for habeas corpus, it will grant relief only if the state court error is sufficiently egregious as to render the entire trial fundamentally unfair.[198] The challenged evidence must be a crucial, critical, or highly significant factor in the context of the entire case.[199] The test to determine whether a trial error makes a trial fundamentally unfair is whether there is a

---

[197] **Johnson v. Puckett**, 176 F.3d at 820; **Pemberton v. Collins**, 991 F.2d at 1226.

[198] **Castillo v. Johnson**, 141 F.3d 218, 224 (5th Cir. 1998), **cert. denied**, 119 S. Ct. 28 (1998); **Neal v. Cain**, 141 F.3d 207, 214 (5th Cir. 1998); **Pemberton v. Collins**, 991 F.2d at 1226; **Jernigan v. Collins**, 980 F.2d 292, 298 (5th Cir. 1992), **cert. denied**, 508 U.S. 978 (1993); **Edwards v. Lynaugh**, 882 F.2d 160, 164 (5th Cir. 1989); **Bridge v. Lynaugh**, 838 F.2d at 772; **Mullen v. Blackburn**, 808 F.2d 1143, 1145 (5th Cir. 1987); **Dillard v. Blackburn**, 780 F.2d 509, 513 (5th Cir. 1986).

[199] **Johnson v. Puckett**, 176 F.3d at 821; **Little v. Johnson**, 162 F.3d at 862; **Green v. Johnson**, 160 F.3d at 1047; **Neal v. Cain**, 141 F.3d at 214; **Lucas v. Johnson**, 132 F.3d at 1079; **Jernigan v. Collins**, 980 F.2d at 298; **Bridge v. Lynaugh**, 838 F.2d at 772; **Thomas v. Lynaugh**, 812 F.2d 225, 230 (5th Cir.), **cert. denied**, 484 U.S. 842 (1987); **Mullen v. Blackburn**, 808 F.2d at 1145.

reasonable probability the verdict might have been different had the trial been properly conducted.[200]

The trial court's admission of the testimony of Dr. Rast did not render petitioner's trial fundamentally unfair. On the contrary, while being questioned by the prosecution, the only specific testimony Dr. Rast offered regarding petitioner consisted of admissions he had never examined petitioner or knew petitioner personally but that in his opinion, any person who had engaged in all the violent, criminal conduct the prosecutor enumerated in a long-winded hypothetical would, in all probability, continue to commit harmful acts to others, regardless of whether incarcerated or free.[201] Significantly, Dr. Rast offered no testimony based upon any examination of petitioner or of petitioner's mental health records or background.[202]

Thus, insofar as petitioner purports to premise his due process claim on the Supreme Court's opinions in cases such as **Estelle v. Smith**,[203] that effort is in vain. Unlike that

---

[200] See **Guidroz v. Lynaugh**, 852 F.2d 832, 835 (5th Cir. 1988); **Rogers v. Lynaugh**, 848 F.2d 606, 609 (5th Cir. 1988).

[201] See S.F. Trial, Volume 6, testimony of Dr. Robert Rast at pp. 207-08. Dr. Rast relied on the elements of the prosecution's hypothetical which established that the hypothetical person in question had engaged in repeated, violent escape attempts while in custody as the basis for his opinion that this hypothetical person would probably continue to behave violently toward others. **Id.**

[202] **Id.** at pp. 209-10.

[203] 451 U.S. 454 (1981).

opinion and the many others which address claims that mental health experts failed to properly advise a criminal defendant of the possible consequences of their cooperating during a psychiatric or psychological interview, there is no dispute that Dr. Rast did not examine petitioner or attempt to testify to any specific facts regarding petitioner personally [204] **Estelle v. Smith** and its progeny are inapposite to petitioner's case.[205]

Likewise, there appears to be no genuine dispute that petitioner and his counsel were well aware that the prosecution intended to present expert mental health testimony on the issue of future dangerousness. Petitioner's trial counsel cross-examined Dr. Rast extensively at trial and elicited a great deal of information regarding the difficulty

---

[204] Petitioner's reliance on Fifth Circuit opinions such as **Gholson v. Estelle**, 675 F.2d 734 (5th Cir. 1982), and **Vanderbilt v. Collins**, 994 F.2d 189 (5th Cir. 1993), is unavailing. Those cases addressed situations in which capital murder defendants were denied **Miranda** warnings during interviews by mental health experts who later testified against the defendants at the punishment phase of trial. It is undisputed that Dr. Rast never examined the petitioner and did not rely on any information gleamed in any interview similar to those in either **Gholson** or **Vanderbilt**.

[205] Petitioner's reliance on **Gardner v. Florida**, 430 U.S. 349 (1977), is not persuasive. In **Gardner**, the Supreme Court struck down a death sentence imposed after a state trial judge relied upon information contained in a confidential pre-sentence investigative report, which was never disclosed to defense counsel, to overrule a jury's recommendation of a life sentence.

mental health professionals experience attempting to predict future criminal conduct by convicted felons. Petitioner has identified no additional issues his trial counsel could have explored in further cross-examination had greater advance notice of Dr. Rast's identity been furnished prior to his taking the stand at petitioner's 1981 trial.

In truth, petitioner's trial counsel was quite well prepared when he cross-examined Dr. Rast. Petitioner's lay jury was perfectly capable of reaching the conclusion of future dangerousness on its own, especially when the evidence was undisputed the petitioner had twice attempted to murder jail guards during escape attempts and had repeatedly threatened to return and "get" other jail guards if he were ever to obtain his freedom. Judged in proper context, Dr. Rast's opinion regarding the petitioner's future dangerousness was superfluous.

(3) Sixth Amendment Claims

(a) **Estelle v. Smith** Variant

Insofar as petitioner relies upon the Sixth Amendment aspect of **Estelle v. Smith** and its progeny, that attempt fails because, as explained above, Dr. Rast never interviewed petitioner and did not purport to base his opinion on any information obtained through an uncounseled interview of petitioner. Thus, the Sixth Amendment component of **Estelle** and its progeny does not apply to the petitioner's case.

(b) True Ineffective Assistance

The constitutional standard for determining whether a criminal defendant has been denied the effective assistance of counsel, as guaranteed by the Sixth Amendment, was

announced by the Supreme Court in the case of **Strickland v. Washington**:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[206]

In order to establish his counsel's performance was constitutionally deficient, a convicted defendant must show counsel's representation "fell below an objective standard of reasonableness."[207] In so doing, a convicted defendant must carry the burden of proof and overcome a strong presumption the conduct of his trial counsel falls within a wide range of

---

[206] 466 U.S. 668, 687 (1984).

[207] **Darden v. Wainwright**, 477 U.S. 168, 184 (1986); **Strickland v. Washington**, 466 U.S. at 687-88; **Lackey v. Johnson**, 116 F.3d 149, 152 (5th Cir. 1997); **Andrews v. Collins**, 21 F.3d 612, 621 (5th Cir. 1994), **cert. denied**, 513 U.S. 1114 (1995); **Duff-Smith v. Collins**, 973 F.2d 1175, 1182 (5th Cir. 1992), **cert. denied**, 507 U.S. 1056 (1993); **Black v. Collins**, 962 F.2d 394, 401 (5th Cir.), **cert. denied**, 504 U.S. 992 (1992).

reasonable professional assistance.[208] The courts are extremely deferential in scrutinizing the performance of counsel and make every effort to eliminate the distorting effects of hindsight.[209] It is strongly presumed that counsel

---

[208] See **Strickland v. Washington**, 466 U.S. at 687-91; **Green v. Johnson**, 160 F.3d at 1035 n.l; **Carter v. Johnson**, 131 F.3d at 463; **Belyeu v. Scott**, 67 F.3d 535, 538 (5th Cir. 1995), **cert. denied**, 517 U.S. 1144 (1996); **Duff-Smith v. Collins**, 973 F.2d at 1182. A federal habeas petitioner must carry the burden of demonstrating both counsel's deficient performance and resultant prejudice. **Burnett v. Collins**, 982 F.2d 922, 928 (5th Cir. 1993); **Martin v. Maggio**, 711 F.2d 1273, 1279 (5th Cir. 1983), **cert. denied**, 469 U.S. 1028 (1984).

[209] See **Lockhart v. Fretwell**, 506 U.S. 364, 372 (1993); **Burger v. Kemp**, 483 U.S. 776, 789 (1987); **Strickland v. Washington**, 466 U.S. at 689; **Carter v. Johnson**, 131 F.3d at 463; **Williams v. Cain**, 125 F.3d at 276 (holding that review of the first prong of **Strickland** requires consideration of the facts and resources available to defense counsel at the time of trial); **Green v. Johnson**, 116 F.3d 1115, 1122 (5th Cir. 1997); **United States v. Gaudet**, 81 F.3d 585, 592 (5th Cir. 1996); **Belyeu v. Scott**, 67 F.3d at 538. The deficiency prong of **Strickland** is judged by counsel's conduct under the law existing at the time of the conduct, see **Westley v. Johnson**, 83 F.3d 714, 723 (5th Cir. 1996), **cert. denied**, 519 U.S. 1094 (1997)(citing **Lockhart v. Fretwell**, 506 U.S. at 372), and in view of the facts and resources available at the time of trial, see **Williams v. Cain**, 125 F.3d at 276 (citing **Motley v. Collins**, 18 F.3d 1223, 1226 (5th Cir.), **cert. denied**, 513 U.S. 960 (1994)).

has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.[210] An attorney's strategic choices, usually based on information supplied by the defendant and from a thorough investigation of relevant facts and law are virtually unchallengeable.[211] Counsel is required neither to advance

---

[210] See **Strickland v. Washington**, 466 U.S. at 690; **Duff-Smith v. Collins**, 973 F.2d at 1182.

[211] See **Jones v. Jones**, 163 F.3d 285, 300 (5th Cir. 1998), **cert. denied**, 120 S. Ct. 224 (1999); **Ransom v. Johnson**, 126 F.3d 716, 721 (5th Cir.), **cert. denied**, 522 U.S. 944 (1997); **Green v. Johnson**, 116 F.3d at 1122("A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness."); **Boyle v. Johnson**, 93 F.3d 180, 187-88 (5th Cir. 1996), **cert. denied**, 519 U.S. 1120 (1997) (holding that an attorney's decision not to pursue a mental health defense or to present mitigating evidence concerning the defendant's possible mental illness was reasonable where counsel was concerned that such testimony would not be viewed as mitigating by the jury and that the prosecution might respond to such testimony by putting on its own psychiatric testimony regarding the defendant's violent tendencies); **West v. Johnson**, 92 F.3d 1385, 1406-09 (5th Cir. 1996), **cert. denied**, 520 U.S. 1242 (1997)(holding that a trial counsel's failure to conduct further investigation into the defendant's head injury and psychological problems was reasonable where interviews with the defendant and the defendant's family failed to produce any helpful information); **Bryant v. Scott**, 28 F.3d 1411, 1435 (5th Cir. 1994)(citing **Strickland v.**

every non-frivolous argument nor to investigate every conceivable matter inquiry into which could be classified as non-frivolous.[212] A criminal defense counsel is not required to

---

Washington, 466 U.S. at 691); **Andrews v. Collins**, 21 F.3d at 623 (holding that counsel acted reasonably in failing to further pursue the defendant's mental capacity or background where counsel had no reason to believe that further investigation would be useful).

[212] See **Neal v. Cain**, 141 F.3d 207, 214-15 (5th Cir. 1998) (holding that petitioner's complaints regarding counsel's failure to raise specific defenses did not satisfy prejudice prong of **Strickland** where proposed defenses were without merit); **Sones v. Hargett**, 61 F.3d 410, 415 n.5 (5th Cir. 1995) ("Counsel cannot be deficient for failing to press a frivolous point."); **United States v. Gibson**, 55 F.3d 173, 179 (5th Cir. 1995)("Counsel is not required by the Sixth Amendment to file meritless motions."); **Smith v. Collins**, 977 F.2d 951, 960 (5th Cir. 1992), **cert. denied**, 510 U.S. 829 (1993) ("The defense of a criminal case is not an undertaking in which everything not prohibited is required. Nor does it contemplate the employment of wholly unlimited time and resources."); **Koch v. Puckett**, 907 F.2d 524, 527 (5th Cir. 1990) ("counsel is not required to make futile motions or objections"); **Schwander v. Blackburn**, 750 F.2d 494, 500 (5th Cir. 1985) (holding that defense counsel is not required to investigate everyone whose name is mentioned by the defendant); **Murray v. Maggio**, 736 F.2d 279, 283 (5th Cir. 1984) ("Counsel is not required to engage in the filing of futile motions.")

exercise clairvoyance during the course of a criminal trial.[213] Likewise, the Sixth Amendment does not require that counsel do what is impossible or unethical; if there is no bona fide defense to the charge, counsel is not required to create one.[214]

The proper standard for evaluating counsel's performance under the Sixth Amendment is "reasonably effective assistance."[215] "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[216] Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."[217] In order to establish he has sustained prejudice, the convicted defendant "must show that there is a reasonable probability that, but for counsel's unprofessional

---

[213] See **Sharp v. Johnson**, 107 F.3d 282, 290 n.28 (5th Cir. 1997)(citing **Garland v. Maggio**, 717 F. 2d 199, 207 (5th Cir. 1983)) (holding that clairvoyance is not a required attribute of effective representation); see also **Lackey v. Johnson**, 116 F.3d at 152 (holding that trial counsel was not ineffective for failing to discover evidence about which the defendant knew but withheld from his counsel).

[214] See **United States v. Cronic**, 466 U.S. 648, 656 n.19 (1984); **Jones v. Jones**, 163 F.3d 285, 303 (5th Cir, 1998).

[215] **Strickland v. Washington**, 466 U.S. at 687; **Bullock v. Whitley** 53 F.3d 697, 700 (5th Cir. 1995).

[216] **Strickland v. Washington**, 466 U.S. at 691.

[217] **Strickland v. Washington**, 466 U.S. at 692.

errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.[218] In addition, analysis of the second or "prejudice" prong of the **Strickland** test must include examination of whether counsel's deficient performance caused the outcome to be unreliable or the proceeding to be fundamentally unfair.[219] "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him."[220]

In summary, in order to prevail on a claim of ineffective assistance of counsel, a convicted defendant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the

---

[218] 466 U.S. at 694.

[219] See **Lockhart v. Fretwell**, 506 U.S. 364, 368-73 (1993); **Mayabb v. Johnson**, 168 F.3d 863, 869 (5th Cir.), **cert. denied**, 120 S. Ct. 409 (1999); **Green v. Johnson**, 160 F.3d at 1035-36; **Goodwin v. Johnson**, 132 F.3d at 174; **Carter v. Johnson**, 131 F.3d at 463; **Ransom v. Johnson**, 126 F.3d at 721; **Lackey v. Johnson**, 116 F.3d at 152; **Vuong v. Scott**, 62 F.3d 673, 685 (5th Cir.), **cert. denied**, 516 U.S. 1005 (1995); **Armstead v. Scott**, 37 F.3d 202, 207 (5th Cir. 1994), **cert. denied**, 514 U.S. 1071 (1995).

[220] **Lockhart v. Fretwell**, 506 U.S. at 372. Thus, prejudice is measured by current law and not by the law as it existed at the time of the alleged error. See **Goodwin v. Johnson**, 132 F.3d at 172 n.5; **Westley v. Johnson**, 83 F.3d at 723 (citing **Lockhart v. Fretwell**, 506 U.S. at 372-73).

result of the proceeding would have been different and that the defendant's trial was thereby rendered fundamentally unfair or unreliable.[221]

Insofar as petitioner argues his trial counsel rendered ineffective assistance in some manner in connection with Dr. Rast's testimony, that effort fails for two reasons. First, petitioner has failed to identify anything else his trial counsel could or should have done in terms of objecting or responding to Dr. Rast's testimony. In short, petitioner has failed to identify any deficiency in the performance of his counsel with regard to the admission of Dr. Rast's testimony. Petitioner's trial counsel made a timely objection to Dr. Rast's testimony and cross-examined Dr. Rast extensively. Petitioner has not identified any additional questions or areas he now claims his trial counsel should have explored during cross-examination

---

[221] See **Kimmelman v. Morrison**, 477 U.S. 365, 375 (1986); **Darden v. Wainwright**, 477 U.S. at 184; and **William v. Collins**, 16 F.3d 626, 631 (5th Cir.), **cert. denied**, 512 U.S. 1289 (1994). In the course of the latter portion of this inquiry, the Court must consider not merely whether the outcome of the defendant's case would have been different but also whether counsel's deficient performance caused the outcome to be unreliable or the proceeding to be fundamentally unfair. See **Lockhart v. Fretwell**, 506 U.S. at 368-73; **Green v. Johnson**, 160 F.3d at 1036; **Goodwin v. Johnson**, 132 F.3d at 174 (holding that the presence or absence of prejudice, both at trial and on appeal, hinges upon the fairness of the trial and the reliability of the judgment of conviction resulting therefrom); **Carter v. Johnson**, 131 F.3d at 463; **Ransom v. Johnson**, 126 F.3d at 721; **Armstead v. Scott**, 37 F.3d at 207.

of Dr. Rast. Under such circumstances, petitioner's ineffective assistance claim fails to satisfy the first prong of **Strickland**.

Second, given the overwhelming evidence regarding petitioner's long history of violent criminal activity, both while free and during periods of custodial detention, including two attempts at murdering jail guards in the course of escape attempts and repeated threats to return and "get" other jail guards if he were ever to see freedom, there is no probability that, but for the failure of petitioner's trial counsel to more thoroughly cross-examine Dr. Rast or to request a continuance, the outcome of the punishment phase of petitioner's 1981 trial would have been any different. Likewise, the failure of petitioner's trial counsel to more extensively cross-examine Dr. Rast did not render the outcome of the punishment phase of petitioner's trial either unreliable or fundamentally unfair. Petitioner's repeated violent assaults on jail guards while in custody awaiting trial and his threats to "get" other guards if he ever did see freedom rendered the jury's answer to the future dangerousness issue all but a forgone conclusion. The only mitigating evidence petitioner presented at trial was limited to testimony establishing either the nearly idyllic childhood petitioner's experienced, petitioner's artistic and poetic talents, petitioner's kind nature, or petitioner's repeated religious conversions which pre-dated his most violent escape attempts.

For the foregoing reasons, petitioner's complaints about the performance of his trial counsel vis-a-vis Dr. Rast fail to satisfy either prong of **Strickland**.

Likewise, the strategic rationale underlying the tactical decision by petitioner's trial counsel not to pursue

potential evidence petitioner suffered from child abuse or sexual abuse did not render the performance of said counsel professionally deficient [222]

---

[222] See **Crane v. Johnson**, 178 F.3d at 313-14 (holding that trial counsel's failure to develop and present purportedly mitigating evidence regarding defendant's mental impairment was reasonable strategic decision where trial counsel investigated defendant's mental impairment and concluded that evidence of same would defeat trial strategy of attempting to obtain a favorable jury response to future dangerousness issue and might have opened door to harmful evidence regarding the defendant's rages and violent tendencies); **Rector v. Johnson**, 120 F.3d at 564 (holding that failure to present mitigating evidence is not a per se showing of ineffective assistance if based on well informed, strategic decisions); **Wilkerson v. Collins**, 950 F.2d at 1065 (holding the same); **Garland v. Maggio**, 717 F.2d at 206 ("A conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it permeates the entire trial with obvious unfairness.")

Petitioner's lead trial counsel, attorney Allen Cazier, testified extensively at the hearing in petitioner's state habeas corpus proceeding that (1) his interviews with the petitioner and petitioner's family revealed no history of child abuse, sexual abuse, learning disabilities, mental retardation, or a deprived background, (2) evidence the petitioner suffered abuse as a child would have dove tailed with the prosecution's strategy at the punishment phase of trial to show the petitioner was a sociopath, (3) defense counsel attempted to introduce evidence at trial which negated the prosecution's claim the petitioner

was a sociopath, (4) defense counsel did not pursue mental health evidence for fear it would be used against petitioner at trial, and (5) he never came across any evidence showing the petitioner was insane or suffering from any mental defect at the time of his offense. See State Habeas hearing, Volume V of VIII, testimony of Allen Cazier at pp. 517-20, 526-27, 529-32, 567-68, 576-77, 579-80, 591-92, 595, 597-99, 601, 603, 605-06, 610, and 612. In sum, there was ample evidence presented to the state habeas court establishing that the failure of petitioner's trial counsel to pursue, develop, and introduce evidence the petitioner was abused as a child was a reasonable, tactical one.

b. **Teague** Foreclosure

Respondent correctly argues that in **Gray v. Netherland**,[223] the Supreme Court held, under facts remarkably similar to those surrounding the trial court's admission of Dr. Rast's testimony, that there is no federal constitutional rule requiring disclosure of all of the prosecution's evidence prior to trial and that exclusion of a witness's testimony, as opposed to a continuance, is not necessarily mandatory when a defendant is confronted with an allegedly surprise witness. Petitioner's complaints about the admission of Dr. Rast's testimony are virtually identical to those the Supreme Court held in **Gray** were barred by the non-retroactivity doctrine of **Teague**. In fact, petitioner's trial counsel had far more specific notice regarding the nature of the allegedly surprise witness, i.e., Dr. Rast, than did the defendant's attorneys in **Gray**. Petitioner's fifth claim for relief is barred by **Teague**.

c. Harmless Error

Regardless of whether petitioner bases his fifth claim on Sixth Amendment effective representation grounds or relies on purely due process principles, for the reasons set forth below, the admission of the testimony of Dr. Rast most certainly did not have a substantial and injurious effect or influence on the jury's verdict at either stage of petitioner's trial.[224] As explained in detail above, petitioner's trial counsel was aware the prosecution would attempt to elicit expert testimony regarding petitioner's future dangerousness and

---

[223] 518 U.S. 152, 167-69 (1996).

[224] See **Woods v. Johnson**, 75 F.3d at 1029-30(holding harmless alleged error under **Estelle v. Smith**).

was amply prepared to meet that testimony with published materials and reports establishing the difficulty mental health experts experienced up to that time predicting future dangerousness. Furthermore, Dr. Rast's substantive testimony was little more than a conclusion, based upon a hypothetical that generally tracked the evidence, that a person who had repeatedly committed acts of violence, both while free and in custody, was likely to continue to do so. Given the overwhelming evidence regarding the petitioner's future dangerousness, the admission of Dr. Rast's testimony did not have a substantial and injurious effect on the jury's verdict at the punishment phase of petitioner's trial.

3. AEDPA Review

Because petitioner's complaints about the admission of Dr. Rast's testimony do not establish a violation of either petitioner's due process right to a fair trial, his right to avoid compulsory self-incrimination, or his right to effective assistance of counsel, the Texas Court of Criminal Appeals acted reasonably in denying relief when petitioner presented the same claims to that court. Petitioner's fifth claim for relief is also barred by **Teague**. Under such circumstances, the state court's rejection of petitioner's fifth claim for relief was neither (1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, nor (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore, petitioner's fifth claim does not warrant federal habeas relief under the AEDPA.

4. Conclusions

The evidence regarding the deliberate nature of petitioner's offense and petitioner's propensity for future, violent, criminal conduct was so overwhelming that the allegedly erroneous admission of Dr. Rast's testimony was harmless. Furthermore, petitioner's fifth claim for relief is foreclosed by the holding in **Teague**. Moreover, because Dr. Rast never interviewed petitioner and did not attempt to rely upon any information obtained through an uncounseled, un-**Mirandized**, interview or examination, petitioner's Fifth and Sixth Amendment claims are non sequitur.

F. Erroneous Admission of Sundry Evidence

1. The Claims

In his sixth and ninth claims for relief, petitioner complains about the admission of testimony regarding petitioner's Federal Youth Corrections Act conviction, extraneous criminal conduct by petitioner, allegedly inflammatory evidence regarding petitioner's relationship to the three underage prostitutes with whom he was traveling at the time he murdered the two unarmed security guards, and purported victim impact evidence.[225]

2. De Novo Review

a. Constitutional Standard

As explained above, a federal court may grant habeas relief based on an erroneous state court evidentiary ruling only if the ruling also violates a specific federal constitutional

---

[225] See Amended Petition at pp. 74-81 and 100-09; Reply Memorandum at pp. 17-18 and 20-21.

right or renders the petitioner's trial fundamentally unfair.[226] "A state court's evidentiary rulings present cognizable habeas claims only if they run afoul of a specific constitutional right or render the petitioner's trial fundamentally unfair."[227] When a federal court reviews state court evidentiary rulings on a petition for habeas corpus, it will grant relief only if the state court error is sufficiently egregious as to render the entire trial fundamentally unfair.[228] The challenged evidence must be a crucial, critical, or highly significant factor in the context of the entire case.[229] The test to determine whether a trial error makes a trial fundamentally unfair is whether there is a

---

[226] **Johnson v. Puckett**, 176 F.3d 809, 820 (5th Cir. 1999); **Little v. Johnson**, 162 F.3d at 860; **Green v. Johnson**, 160 F.3d at 1047; **Lucas v. Johnson**, 132 F.3d at 1079; **Gochicoa v. Johnson**, 118 F.3d at 446; **Cupit v. Whitley**, 28 F.3d at 536; **Andrade v. McCotter**, 805 F.2d at 1193.

[227] **Johnson v. Puckett**, 176 F.3d at 820; **Pemberton v. Collins**, 991 F.2d at 1226.

[228] **Castillo v. Johnson**, 141 F.3d at 224; **Neal v. Cain**, 141 F.3d at 214; **Pemberton v. Collins**, 991 F.2d at 1226; **Jernigan v. Collins**, 980 F.2d at 298; **Edwards v. Lynaugh**, 882 F.2d at 164; **Bridge v. Lynaugh**, 838 F.2d at 772; **Mullen v. Blackburn**, 808 F.2d at 1145; **Dillard v. Blackburn**, 780 F.2d at 513.

[229] **Puckett v. Johnson**, 176 F.3d at 821; **Little v. Johnson**, 162 F.3d at 862; **Green v. Johnson**, 160 F.3d at 1047; **Neal v. Cain**, 141 F.3d at 214; **Lucas v. Johnson**, 132 F.3d at 1079; **Jernigan v. Collins**, 980 F.2d at 298; **Bridge v. Lynaugh**, 838 F.2d at 772; **Thomas v. Lynaugh**, 812 F.2d at 230; **Mullen v. Blackburn**, 808 F.2d at 1145.

reasonable probability the verdict might have been different had the trial been properly conducted.[230]

b. Petitioner's 1973 Federal Conviction

Petitioner argues the trial court erred in admitting, at the punishment phase of his trial, evidence regarding petitioner's 1973 Federal Youth Corrections Act (FYCA) conviction for possession of stolen mail. Petitioner argues this conviction was "automatically set aside" in 1979 and should not have been admitted for any purpose.

First, contrary to the premise underlying petitioner's complaint about the admission of testimony regarding his FYCA conviction, federal law did not provide that a defendant, such as petitioner, who was discharged from probation or parole under the FYCA received an automatic expungement of his conviction.[231] Petitioner's reliance on the Fifth Circuit's holding in **United States v. Arrington**,[232] is

---

[230] See **Guidroz v. Lynaugh**, 852 F.2d at 835; **Rogers v. Lynaugh**, 848 F.2d at 609.

[231] Former Section 5021(a) of Title 18, United States Code, provided as follows:

(a) Upon the unconditional discharge by the division of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the division shall issue to the youth offender a certificate to that effect.

75 Stat. 750 (emphasis added).

[232] 618 F.2d 1119 (5th Cir. 1980) , **cert. denied**, 449 U.S. 1086 (1981).

misplaced. The United States Supreme Court expressly rejected the interpretation of the FYCA the Fifth Circuit employed in **Arrington** when it held in **Tuten v. United States**,[233] that a youth offender convicted and sentenced under the terms of the FYCA had to be discharged prior to the maximum sentence actually imposed to be entitled to the automatic expungement provision of Section 5021(a). Furthermore, the principal precedent relied upon by the Fifth Circuit in **Arrington**, i.e., **Minshew v. United States**,[234] actually held that to be entitled to automatic expungement under the FYCA, a youth offender must be discharged before the maximum term of his sentence imposed. Likewise, in **Dorszynski v. United States**,[235] the United States Supreme Court recognized that the Division's discretionary authority to discharge a youth offender unconditionally before it was required to do so is what triggered the automatic expungement provision of Section 5021. In short, the holding in **Arrington** on which petitioner relies, was subsequently rejected by the Supreme Court and, therefore, not controlling. Petitioner is not entitled to the benefit of the automatic expungement provisions of the former FYCA because he was never discharged early from his FYCA sentence. On the contrary, petitioner's former federal parole officer testified at petitioner's trial petitioner was not discharged early and that no certificate of expungement was made in petitioner's

---

[233] 460 U.S. 660, 666-68 (1983).

[234] 410 F.2d 396, 397 (5th Cir. 1969).

[235] 418 U.S. 424, 435 (1974).

case.[236] Thus the factual and legal premise for petitioner's sixth claim for relief herein is not present.

Second, the applicable Texas statutes governing the admission of evidence at petitioner's 1981 trial allowed admission of evidence of any probated or suspended sentence at the punishment phase of trial.[237] Petitioner has not alleged any legitimate legal basis for excluding evidence of his 1973 FYCA conviction from the punishment phase of his 1981 trial. It is well-settled that under the Texas capital sentencing scheme, the admission of evidence of extraneous, unadjudicated offenses at the punishment phase of a Texas capital murder trial does not violate a defendant's constitutional rights.[238] Nothing in Texas law requires that there be a final conviction in order for extraneous offenses to be admissible at the punishment phase of a capital murder trial.[239] Furthermore, the prosecution need not prove beyond a

---

[236] See S.F. Trial, Volume 6, testimony of Robert Mitchell at pp. 66-68. Mr. Mitchell also testified that the petitioner was considered a high risk prisoner. **Id.** at p. 65.

[237] See **Hogue v. Johnson**, 131 F.3d at 478 n.16.

[238] See **Harris v. Johnson**, 81 F.3d at 541; **Montoya v. Scott**, 65 F.3d at 421; **Kinnamon v. Scott**, 33 F.3d at 466; **Clark v. Collins**, 19 F.3d at 966; **Duff-Smith v. Collins**, 973 F.2d at 1184; **Landry v. Lynaugh**, 844 F. 2d 1117, 1121 (5th Cir.), **cert. denied**, 488 U.S. 900 (1988); **Williams v. Lynaugh**, 814 F.2d 205, 207-08 (5th Cir.), **cert. denied**, 484 U.S. 935 (1987); **Milton v. Procunier**, 744 F.2d 1091, 1097 (5th Cir. 1984), **cert. denied**, 471 U.S. 1030 (1985).

[239] See **Hogue v. Johnson**, 131 F.3d at 478 n.16.

reasonable doubt the defendant committed the unadjudicated extraneous offenses entered into evidence at the punishment phase of a Texas capital murder trial.[240] If admission of evidence regarding extraneous, unadjudicated, criminal conduct is admissible at the punishment phase of a Texas capital murder trial, certainly no barrier exists to admission of evidence of a federal crime committed when the defendant was seventeen. Petitioner's citations to opinions addressing the peculiar conundrums that arise in weighing states are of little value here because Texas is not a weighing state.[241] Petitioner has not identified any legitimate legal basis for excluding evidence of his 1973 conviction from the punishment phase of his 1981 capital murder trial.

Third, given the overwhelming evidence establishing petitioner's penchant for continued violence even after his placement in custodial detention,[242] and petitioner's track

---

[240] See **Vega v. Johnson**, 149 F.3d 354, 359 (5th Cir. 1998), **cert. denied**, 525 U.S. 1119 (1999) (holding that extraneous offenses offered at the punishment phase of a capital trial need not be proven beyond a reasonable doubt); **Turner v. Johnson**, 106 F.3d 1178, 1189 (5th Cir. 1997).

[241] See **Hogue v. Johnson**, 131 F.3d at 498-99 n.60.

[242] In addition to petitioner's many violent attacks upon jail guards summarized above, there was also testimony at the punishment phase of his 1981 capital murder trial that (1) the petitioner's reputation for being peaceful and law-abiding in his home town of Oklahoma City was bad, see S.F. Trial, Volume 6, testimony of Robert Jones at p. 53, and (2) during his capital murder trial, the petitioner was found in possession of a broken mirror and a five foot

record of violent offenses prior to his pretrial detention,[243] there is no possibility, much less any probability, that the admission of evidence regarding an eight-year-old conviction for possession of stolen mail had any substantial and injurious impact on the outcome of the punishment phase of petitioner's trial. In short, admission of evidence regarding petitioner's conviction for possession of stolen mail added virtually nothing on the issue of future dangerousness to the largely undisputed evidence that petitioner (1) led a gang that robbed four elderly people and raped an elderly woman, (2) mercilessly gunned down, after robbing, two unarmed guards in a San Antonio stairwell, (3) made two attempts to murder jail guards and escape while in custody, (4) assaulted and threatened to assault other guards on numerous occasions while in custody, and (5) was found in possession of a broken mirror and extension cord during his capital murder trial. Any error in the admission of evidence regarding petitioner's 1973 conviction was harmless as a matter of federal law.[244]

---

extension cord, neither of which petitioner was authorized to possess in the Bexar County Jail, see S.F. Trial, Volume 6, testimony of Richard R. Campbell at pp. 145-48.

[243] Mary Wilkinson testified concerning the petitioner's robbery and rape of her in January, 1979. See S.F. Trial, Volume 6, testimony of Mary Wilkinson at pp. 171-77 and 182.

[244] See **Hogue v. Johnson**, 131 F.3d at 500-02 (holding harmless the admission of evidence of a prior conviction under the **Brecht** standard in circumstances not unlike those involving petitioner's 1973 FYCA conviction).

In the context of petitioner's entire 1981 trial, the evidence regarding his 1973 conviction was not a crucial, critical, or highly significant factor and did not render petitioner's entire trial fundamentally unfair.

c. Extraneous Offense Evidence

Petitioner complains in his ninth claim for relief about admission of evidence (1) relating to the murder of Howard Powers, (2) referring to petitioner's underage female traveling companions as "prostitutes" and the petitioner as a "pimp," (3) petitioner's assault upon Lisa Laursen, and (4) petitioner bragging that he had been to prison and wore jewelry from prior robberies.

After careful review of the entire record from the petitioner's trial, this Court concludes the admission of the foregoing evidence was not a crucial, critical, or highly significant factor in the context of petitioner's trial and did not render petitioner's entire trial fundamentally unfair.

There was nothing "extraneous" about the evidence of petitioner's murder of Powers. It is difficult to imagine how evidence of petitioner's virtually simultaneous murder of both Ebbert and Powers at the same location during the course of the same robbery could have been separated. The jury needed to understand the circumstances surrounding petitioner's murder of Powers in order to make sense of the petitioner's murder of Ebbert. Petitioner murdered both his victims at the same place, in the same manner, almost simultaneously. Clearly, petitioner's murders of both his victims were inextricably intertwined from an evidentiary and practical

standpoint.[245] Petitioner's complaints about the extensive testimony regarding Powers' autopsy likewise misses the mark. Testimony regarding Powers' death was relevant to preclude any defense argument that petitioner acted in self-defense when he fatally shot Ebbert and Powers. The autopsy testimony precluded any claim that either Powers or Ebbert were behaving aggressively when petitioner shot them and tended to corroborate the testimony of Franklin and Bearden regarding the petitioner's confessions to them that he shot his victims after they handed over their wallets and while they begged for their lives. The evidence showing the brutality of the murder of both victims was also relevant to avoid any claim petitioner had acted negligently or the shootings had been accidental.

Likewise, this Court finds no rational means whereby the eyewitness testimony of prosecution witnesses Franklin, Bearden, and Laursen could have been admitted without at least some mention being made of the illicit business relationship between petitioner and these three minor females. The fact that Laursen, Franklin, and Bearden were prostitutes who worked for the petitioner was clearly relevant to the issue of their credibility as trial witnesses against the petitioner.

Petitioner's complaints that the prosecution referred to him at trial as "Silky" are likewise without merit. Not only did Franklin and Bearden testify that they knew the petitioner as "Silky,"[246] but at least one of the ministers who visited

---

[245] See **Neal v. Cain**, 141 F.3d at 214 (recognizing that a defendant's sexual assaults upon his kidnap victim were part of the res gestae of the kidnapping).

[246] See S.F. Trial, Volume 4, testimony of Rhonda Jean Bearden at pp. 256 and 336; Volume 5, testimony of Lisa

petitioner in the Denver Jail testified that petitioner went by that name while in that facility.[247]

Evidence regarding petitioner's assault upon Laursen was clearly admissible on the issue of her credibility as a witness against the petitioner. She admitted to harboring a deep-seated resentment against petitioner arising from the way he had treated her.[248]

As for Laursen's testimony that petitioner told her he had been to prison and the jewelry he wore he obtained in previous robberies, defense counsel promptly objected to both of those statements, and the trial court sustained both objections and directed the jury to disregard same.[249] Juries are presumed to follow the instructions of the trial court.[250]

Laursen at p. 81; and Volume 5, testimony of Victoria Ann Franklin at pp. 166 and 188.

[247] See S.F. Trial, Volume 6, testimony of Lee Griswold at p. 88.

[248] See S.F. Trial, Volume 5, testimony of Lisa Laursen at p. 83.

[249] See S.F. Trial, Volume 5, testimony of Lisa Laursen at pp. 72-74.

[250] See **Zafiro v. United States**, 506 U.S. 534, 540, (1993); **United States v. Fletcher**, 121 F.3d 187, 197 (5th Cir. 1997), **cert. denied**, 522 U.S. 1063 (1998); **United States v. Torres**, 114 F.3d 520, 526 (5th Cir.), **cert. denied**, 522 U.S. 922 (1997); **United States v. Levine**, 80 F.3d 129, 136 (5th Cir.), **cert. denied**, 519 U.S. 824 (1996); **Vuoncg v. Scott**, 62 F.3d 673, 685 (5th Cir.), **cert. denied**, 516 U.S. 1005 (1995).

Laursen's testimony and the trial court's prompt instructions that the jury disregard same must be viewed in the context of the largely uncontested evidence regarding the petitioner's numerous confessions to his murder of the two unarmed security guards. When so examined, Laursen's comments petitioner told her he had been to prison and wore jewelry from prior robberies did not render petitioner's entire trial fundamentally unfair. Laursen clearly bore petitioner ill-will and admitted as much during her cross-examination. In the context of the guilt-innocence phase of the petitioner's trial, the admission of testimony regarding Laursen's animosity toward petitioner and the reasons therefor, as with the evidence regarding petitioner's illicit business relationship with Franklin and Bearden, did not render petitioner's trial fundamentally unfair. That evidence was relevant with regard to the credibility of the three teenage prostitutes who traveled with the petitioner and later testified against him at trial.

Finally, given the overwhelming evidence of petitioner's guilt, which even now petitioner does not seriously contest, assuming there was some error in the admission of the "extraneous" offense evidence discussed above, the admission of that evidence did not have a substantial and harmful effect on the outcome of the guilt-innocence phase of petitioner's trial. Virtually everything of an incriminating nature petitioner told to either Franklin, Bearden, or Laursen, petitioner also disclosed to prosecution witness Mark Stanley Seiver, who also testified against petitioner at the guilt-innocence phase of trial. There was no serious doubt the murder weapon was the same make and model .38 caliber handgun petitioner purchased through Rivers Campbell in Galveston just days before the murders. The petitioner offered no evidence establishing that any of his three traveling companions were present when the petitioner fired the fatal shots, much less that any of them knew about

the murders until petitioner told them or they saw reports on the television. Petitioner did not dispute the testimony showing he displayed money to his three underage female companions and told them he had obtained it from the victims before he shot them. Under such circumstances, the admission of the evidence regarding Powers' murder, petitioner's relationship to his teenage companions, and petitioner's assault upon Laursen did not render petitioner's trial fundamentally unfair or have a substantial and injurious effect on the outcome of the guilt-innocence phase of petitioner's trial.

d. Victim Impact "Evidence"

(1) The Record

Petitioner's complaints about the admission of "victim impact evidence" are actually concerns about remarks made by the prosecution during opening and closing arguments at the guilt-innocence phase of petitioner's trial [251]

For instance, petitioner complains that, during opening statements at the guilt-innocence phase of trial, the prosecution mentioned petitioner left the five children of Howard Powers without a father when petitioner murdered

---

[251] Even if there had been actual evidence, rather than merely jury arguments referring to the victims' families, the Supreme Court's holding in **Payne v. Tennessee**, 501 U.S. 808, 825-26 (1991), overruled the Court's previous precedents barring both the admission of evidence of the impact of a capital murder on the victim and his or her survivors, as well as jury argument regarding same made by prosecutors, at the punishment phase of a capital murder trial.

Powers.[252] Likewise, petitioner complains the prosecution also that John Ebbert left behind a two-month-old child. However, the state trial court granted defense counsel's objection to the prosecutor's reference to Powers' children and directed the jury to disregard same.[253] Moreover, petitioner did not object to the prosecutor's reference to Ebbert's child.[254]

In closing arguments at the guilt-innocence phase of trial, the prosecution made a brief reference to the victims' families: "It's hard to reflect upon the fact that those two men were loved. They were respected. They were relied upon by their families."[255] Later, in the course of responding to defense counsel's argument the two victims had voluntarily handed over their money to petitioner while he held them at gun point, the prosecution argued the victims had been coerced to do so: "Naturally these men were coerced. They wanted to live. They like you felt a responsibility to their families and they like you wanted to go home again to their families. They didn't."[256] There was no objection to either of those remarks.

Thus, the essence of this final aspect of petitioner's ninth claim for relief is a series of complaints about four instances of prosecutorial jury argument, to one of which

---

[252] See S.F. Trial, Volume 4 at pp. 15-16.

[253] **Id.**

[254] See **Id.** at p. 16.

[255] See S.F. Trial, Volume 5 at p. 239.

[256] **Id.** at p. 244.

defense counsel objected and the trial court sustained that objection and directed the jury to ignore same, and the other three to which defense counsel voiced no objection whatsoever.

(2) The Constitutional Standard

An improper prosecutorial argument that does not implicate a specific constitutional provision is not cognizable on collateral review unless the defendant shows an abridgment of due process, i.e., the improper argument rendered the proceeding fundamentally unfair.[257] Improper jury argument by the state does not present a claim of constitutional magnitude in a federal habeas action unless it is so prejudicial that the state court trial was rendered fundamentally unfair within the meaning of the Due Process Clause of the Fourteenth Amendment [258] To establish a prosecutor's remarks are so inflammatory, petitioner must demonstrate the misconduct is persistent and pronounced or

---

[257] See **Ables v. Johnson**, 73 F.3d 591, 592 n.2 (5th Cir.), **cert. denied**, 517 U.S. 1198 (1996); **Ward v. Whitley**, 21 F.3d 1355, 1364 (5th Cir. 1994), **cert. denied**, 513 U.S. 1192 (1995); **Bagley v. Collins**, 1 F.3d 378, 380 (5th Cir. 1993).

[258] See **Darden v. Wainwright**, 477 U.S. 168, 181 (1986); **Ables v. Johnson**, 73 F.3d at 592 n.2; **Nichols v. Scott**, 69 F.3d at 1278 ("the relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process'" (quoting **Darden**)); **Jones v. Butler**, 864 F.2d 348, 356 (5th Cir. 1988), **cert. denied**, 490 U.S. 1075 (1989); **Byrne v. Butler**, 845 F.2d 501, 507 (5th Cir.), **cert. denied** 487 U.S. 1242 (1988).

that the evidence of guilt was so insubstantial that the conviction would not have occurred but for the improper remarks [259] "[A] prosecutor's remarks must be more than undesirable or even universally condemnable before reversal is warranted. Instead, the prosecutor's remarks must infect the trial with such unfairness as to make the resulting conviction a denial of due process."[260] "A prosecutor's improper argument will, in itself, exceed constitutional limitations in only the most egregious cases."[261] The burden is on the

---

[259] See **Turner v. Johnson**, 106 F.3d 1178, 1188 (5th Cir. 1997); **Jones v. Butler**, 864 F.2d at 356 (citing **Felde v. Blackburn**, 795 F.2d 400, 403 (5th Cir. 1986), **cert. denied**, 484 U.S. 873 (1987)); **Byrne v. Butler**, 845 F.2d at 508.

[260] **Bell v. Lynaugh**, 828 F.2d 1085, 1095 (5th Cir.), **cert. denied**, 484 U.S. 933 (1987)(citing **Darden v. Wainwright**, 477 U.S. 168, 181 (1986)); see also **Nichols v. Scott**, 69 F.3d at 1278 (wholly apart from the issue of procedural bar, failure to object to an argument is an indication that it was not perceived as having a substantial adverse effect or would not naturally and necessarily be understood as advancing improper considerations)(citing **Milton v. Procunier**, 744 F.2d 1091, 1095 (5th Cir. 1984), **cert. denied**, 471 U.S. 1030 (1985)); **Buxton v. Collins**, 925 F.2d 816, 825 (5th Cir.), **cert. denied**, 498 U.S. 1128 (1991) (recognizing that the four proper areas for prosecutorial jury argument are summation of the evidence, reasonable inference from the evidence, answers to opposing counsel's argument, and pleas for law enforcement).

habeas petitioner to show a reasonable probability that but for the prosecutor's remarks the result of the trial would have been different.[262]

(3) Synthesis

For the reasons discussed at length above, the evidence of petitioner's guilt introduced at the guilt-innocence phase of trial included not merely the circumstantial evidence establishing petitioner had the motive, the means, and the opportunity to commit the crime of capital murder, but that he bragged about the commission of his offense to Franklin, Bearden, and Seiver. In addition, the evidence established that the petitioner directed Franklin to the crime scene, directed Franklin to dispose of inculpatory evidence and conceal the murder weapon, and showed both Franklin and Bearden the money he obtained in the course of his robbery and murder of Ebbert and Powers. When viewed in proper context, the prosecutor's brief references to the victims' children in his opening jury argument did not render petitioner's trial fundamentally unfair. The trial court directed the jury to disregard the first of those remarks and the jury is presumed to have done so. Petitioner's trial counsel failed to object to the second of those remarks.

The comments of the prosecutor during the closing argument at the guilt-innocence phase of trial were a proper response to defense counsel's contention that the victims had

---

[261] **Ortega v. McCotter**, 808 F.2d 406, 410 (5th Cir. 1987)(citing **Menzies v. Procunier**, 743 F.2d 281, 288-89 (5th Cir. 1984)(Houston v. Estelle, 569 F.2d at 382)).

[262] **Nichols v. Scott**, 69 F.3d at 1278; **Felde v. Blackburn**, 795 F.2d at 403.

"voluntarily" handed over their money to petitioner without regard to the fact petitioner was then holding them at gun point. The prosecutor merely reminded the jury of the many reasons the two victims had to live. In any event, the prosecutor's passing references to the victims' families did not render the guilt-innocence phase of petitioner's trial fundamentally unfair.

e. Harmless Error

Alternatively, this Court concludes that neither the admission of any of the evidence referred to in petitioner's sixth or ninth claims for relief, nor any of the prosecutorial arguments about which petitioner complained in his ninth claim for relief had a substantial and injurious effect on the outcome of either phase of petitioner's 1981 trial. The evidence against petitioner at both phases was overwhelming. Furthermore, insofar as petitioner complains about the admission or consideration by the jury of victim impact evidence or prosecutorial jury argument regarding same during the punishment phase of trial, that complaint is frivolous.[263]

3. AEDPA Standard

In view of the foregoing authorities, findings, and conclusions, the Texas Court of Criminal Appeals' rejection of petitioner's sixth and ninth claims for relief in this cause was the product of neither an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States, nor an unreasonable determination of the facts in light of the evidence presented in the state court

---

[263] See **Payne v. Tennessee**, 501 U.S. at 825-26; **Black v. Collins**, 962 F.2d at 408.

proceeding. Therefore, petitioner's sixth and ninth claims do not warrant federal habeas relief under the AEDPA.

4. Conclusions

Petitioner's complaints about the admission of evidence regarding his 1973 conviction at the punishment phase of his trial disregard the overwhelming evidence of both the deliberate nature of his crimes and petitioner's wanton disregard for human life and the rights of others amply evidenced by his history of violent criminal conduct. Likewise, petitioner's complaints about the admission of evidence regarding Powers' murder, petitioner's relationship to his three underage female traveling companions, and petitioner's acts of violence in their presence do not satisfy the standard for federal habeas relief because that evidence did not render petitioner's trial fundamentally unfair. Moreover, the trial court sustained defense counsel's objections to much of the testimony and argument about which petitioner complains and directed the jury to disregard same. When viewed in the context of the overwhelming evidence of petitioner's guilt and the overwhelming evidence supporting affirmative answers to the two special sentencing issues at the punishment phase of petitioner's trial, none of petitioner's complaints in his sixth or ninth claims for relief warrants federal habeas relief under either a de novo standard or the AEDPA's more narrow form of review. Furthermore, when viewed in light of all the undisputed facts and uncontroverted evidence, all of petitioner's complaints in his sixth and ninth claims herein rise no further than that of harmless error.

G. Delay in Carrying Out Petitioner's Execution

1. The Claim

In his seventh claim for relief, petitioner argues, without citation to any on-point authority, that executing him after he has spent almost two decades on death row somehow violates the Eighth Amendment because most of that delay was attributable to the meandering pace of activity in the Texas appellate courts.[264]

2. De Novo Review

Petitioner has filed several appeals and habeas corpus proceedings. The Texas Court of Criminal Appeals correctly concluded that virtually all of the delay about which the petitioner complains is attributable solely to the efforts of the petitioner to have his conviction or sentence reversed by the state or federal appellate courts.[265]

a. Teague Foreclosure

The Fifth Circuit has consistently rejected the petitioner's complaint about delay in carrying out the execution of a death sentence as foreclosed by the holding in **Teague**.[266]

---

[264] See Amended Petition at pp. 82-95; Reply Memorandum at pp. 18-19.

[265] See State Habeas Records, Volume Four, Order of October 1, 1997, at pp. 9-10.

[266] See **Lackey v. Johnson**, 83 F.3d 116, 117 (5th Cir.), **cert. Denied**, 519 U.S. 911 (1996); **White v. Johnson**, 79 F.3d 432, 437-39 (5th Cir.), **cert. denied**, 519 U.S. 911 (1996); **Lackey v. Scott**, 28 F.3d 486, 492 (5th Cir. 1994), **cert. denied**, 513 U.S. 1086 (1995).

b. No Merit on the Merits

The Fifth Circuit has also repeatedly rejected it on the merits, holding "there are compelling justifications for the delay between conviction and the execution of a death sentence."[267] As the Fifth Circuit has noted:

> "The state's interest in deterrence and swift punishment must compete with its interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards. As a result, states allow prisoners such as [petitioner] to challenge their convictions for years. [Petitioner] has benefitted from this careful and meticulous process and cannot now complain that the expensive and laborious process of habeas corpus appeals which exists to protect him has violated other of his rights. Throughout this process [petitioner] has had the choice of seeking further review of his conviction and sentence or avoiding further delay of his execution by not petitioning for further review or by moving for expedited consideration of his habeas petition.
>
> Even if much of the delay in this case is the fault of Texas, [petitioner] cannot now complain of cruel and unusual punishment. [Petitioner] made no effort to inform the Texas

---

[267] See **White v. Johnson**,79 F.3d at 439; see also **Barber v. Johnson**, 145 F.3d 234, 237 (5th Cir.), **cert. denied**, 119 S. Ct. 518 (1998)(rejecting without comment a claim identical to that raised in **White** and **Lackey**).

> courts that their delay was detrimental to him or to ask for expedited review of his petition and we cannot fault them for assuming that [petitioner] would be grateful for, or at least, indifferent to the delay. [Petitioner] cannot expect Texas courts to know that he wants to get on with his execution without telling them. A motion for expedited review is also necessary so that reviewing courts can distinguish between strategic behavior on the part of the prisoner who quietly waits with the hope of asserting a Lackey claim later and bona fide claims of malicious or intentional state delay. [Petitioner] fails to allege that the delay in his case is due to anything other than court backlog and does not offer any evidence that Texas' delay in considering his petition was intentional or even negligent."[268]

Petitioner does not allege he ever sought expedited review of his state direct appeal or state habeas corpus proceeding. Likewise, petitioner "alleges no extraordinary facts or unusual conditions beyond the inevitable anxiety of waiting for an execution date which cannot be avoided in a system of capital punishment."[269] There was considerable testimony at petitioner's state habeas corpus hearing regarding the conditions under which petitioner has been held on death row at the Ellis One Unit, until recently the sole

---

[268] **White v. Johnson**, 79 F.3d at 439 (citation omitted).

[269] **Id.**

death row in Texas for male prisoners.[270] However, none of that testimony raised any non-frivolous issue regarding the constitutionality of the conditions of petitioner's confinement during his stay on Texas' death row. More specifically, petitioner offered no evidence to show he has suffered any extraordinary emotional or psychological harm above and beyond that which necessarily befalls a person sentenced to death.[271] Under such circumstances, petitioner has failed on the merits to establish his Eighth Amendment rights have been violated by virtue of the delay in carrying out his execution.

3. AEDPA Review

Under such circumstances, the Texas Court of Criminal Appeals' rejection of petitioner's delay argument in the course of petitioner's state habeas corpus proceeding was the product of neither an unreasonable application of clearly

---

[270] See State Habeas Hearing, Volume VI of VIII, testimony of Billie West at pp. 696-888; Volume VII-A of VIII, testimony of Gary Claxton at pp. 2-10. Captain West testified that, like other death row inmates, the petitioner has enjoyed access to medical and psychiatric care, adequate food, adequate clothing, a healthy and safe place to live, access to materials from a law library, reading materials, and the opportunity to participate in a work program throughout petitioner's stay on death row. Officer Claxton testified that the petitioner has never expressed any concern for his conditions on death row, has never displayed suicidal tendencies, has never appeared depressed, but has participated in recreational activities and appeared to enjoy same.

[271] **Id.**

established federal law, as determined by the Supreme Court of the United States, nor an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore, petitioner's seventh claim does not warrant federal habeas relief under the AEDPA.

4. Conclusions

Petitioner's actions in a series of appeals to the United States Supreme Court and in then pursuing state habeas corpus relief on a variety of claims barred by **Teague** are the reason he has not been executed in the more than two decades since petitioner executed Howard Powers and John Ebbert. Petitioner neither alleged nor proved to the state courts he has suffered any extraordinary psychological or emotional distress because of the delay necessarily accompanying his assertion of claims. Petitioner's seventh claim is without merit and also is barred by the holding in **Teague**. Regardless of whether petitioner's seventh claim is reviewed under either a de novo standard or the AEDPA's standard, it does not warrant federal habeas corpus relief in this cause.

H. Texas' Ten/Twelve Rule

1. The Claim

In his eighth claim for relief herein, petitioner argues his constitutional rights were violated by virtue of the impact of section 2(a) of Article 37.071 of the Texas Code of Criminal Procedure on the jury's deliberations at the punishment phase of his capital murder trial.[272]

---

[272] See Amended Petition at pp. 96-100; Reply Memorandum at pp. 19-20.

2. De Novo Review

a. No Merit

Petitioner relies primarily upon the Supreme Court's opinion in **Caldwell v. Mississippi**[273] to support his eighth claim for relief. However, **Caldwell** is inapposite to petitioner's case. In **Caldwell**, the Supreme Court addressed an instance in which a capital murder prosecutor's jury argument suggested in an erroneous and misleading manner that the jury was not the final arbiter of the defendant's fate.[274] To establish a **Caldwell** violation, "a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law."[275] In reviewing a **Caldwell** claim, the proper inquiry is whether under all the facts and circumstances, including the entire trial record, the state has misled the jury regarding its role under

---

[273] 472 U.S. 320 (1985).

[274] In **Caldwell**, the Supreme Court held the following statement by the prosecution during its closing argument undermined reliable exercise of jury discretion:

> Now, [the defense] would have you believe that you're going to kill this man and they know -- they know that your decision is not the final decision. My God, how unfair can they be? Your job is reviewable. They know it.

Caldwell v. Mississippi, **472 U.S. at 325-29.**

[275] **Dugger v. Adams**, 489 U.S. 401, 407 (1989); **Montoya v. Scott**, 65 F.3d at 420; **Sawyer v. Butler**, 881 F.2d 1272, 1285 (5th Cir. 1989), **aff'd sub nom. Sawyer v. Smith**, 497 U.S. 227 (1990).

state law to believe that the responsibility for determining the appropriateness of the imposition of the death penalty rests elsewhere.[276] Nothing in petitioner's punishment phase jury instructions misled petitioner's jury regarding the consequences of their answers to the special sentencing issues.

Petitioner identifies no portion of the prosecutorial argument suggesting that the petitioner's jury would not be the final arbiter of the petitioner's fate. Rather, petitioner argues that the trial court failed to inform the petitioner's jury of the consequence of a hung jury, i.e., the jury's inability to reach unanimity with regard to affirmative answers on the special sentencing issues or to reach a consensus among ten jurors in favor of a negative answer to those same special issues. While a variation upon the theme raised by petitioner's eighth claim for relief has been addressed by the Supreme

---

[276] See **Montoya v. Scott**, 65 F.3d at 420(holding that a Texas trial court's instructions during voir dire that were remarkably similar to the prosecution's statements accurately explaining the Texas special sentencing issues in a capital murder trial and the effect of the jury's answers to those issues did not violate the holding in **Caldwell**); **Mann v. Scott**, 41 F. 3d at 984 (holding that a prosecutor's statements during closing argument to the effect that the jury knew that the defendant would not be executed the same night the jury returned its verdict at the punishment phase of trial did not violate the holding in Caldwell); **Sawyer v. Butler**, 881 F.2d at 1286-87.

Court, that court did so in **Mills v. Maryland**,[277] not in **Caldwell**.[278]

Petitioner argues that the punishment phase jury instructions at his trial improperly misled his jury as to the effect of a single "no" vote on any of the special sentencing issues.[279] Petitioner complains implicitly that the state trial court's failure to advise petitioner's jury regarding the effect of a hung jury violated the principle announced by the Supreme Court in **Mills**, because the state trial court, pursuant to a statutory prohibition, failed to inform the jury at the punishment phase of trial as to the effect of a single "no" vote on any of the special sentencing issues. In essence, petitioner complains that individual members of his jury were not

---

[277] 486 U.S. 367 (1988).

[278] In **Mills**, the Supreme Court struck down a death sentence imposed by a jury that had been given both a confusing and ambiguous set of instructions and a verdict form which could have been construed to bar the jury's consideration of the defendant's mitigating evidence of his youth, mental infirmity, lack of future dangerousness, and State's failure to attempt to rehabilitate him during his prior incarceration unless the jury agreed unanimously on each mitigating factor. See **Mills v. Maryland**, 486 U.S. at 376-83.

[279] Applicable Texas law at the time of petitioner's trial provided, and still provides that a capital sentencing jury must find unanimously to answer a special issue in a manner that would result in a death sentence but may answer any special issue to the contrary if only ten jurors agree to do so. See TEX. CODE CRIM. PROC. ANN. art. 37.071 (d) (2), (f) (2), & (g) (Vernon Supp. 1999).

furnished with a detailed explanation of exactly what constituted a "hung jury" at the punishment phase of a Texas capital murder trial. However, the Fifth Circuit has expressly rejected this same argument, noting that the law in Texas is completely different from that in **Mills**:

> Under the Texas system, all jurors can take into account any mitigating circumstance. One juror cannot preclude the entire jury from considering a mitigating circumstance. Thus, **Mills** is inapplicable.
> The Texas system allows an answer of "Yes" to a special issue if all jurors vote "Yes," and allows an answer of "No" if ten jurors vote "No." **Mills** does not require a certain number of jurors to agree to impose the death penalty.[280]

In order to successfully challenge a state court's jury instructions at the punishment phase of a capital murder trial, a federal habeas petitioner must show more than that a capital sentencing scheme might have resulted in the jury being prevented from considering mitigating evidence; petitioner must show a reasonable likelihood that such actually occurred.[281] In this case, petitioner's argument the jurors at his trial might have concluded from the jury instructions at the punishment phase of trial, that they were precluded from giving effect to their own opinions as to whether petitioner

---

[280] **Jacobs v. Scott**, 31 F.3d 1319, 1328-29 (5th Cir. 1994), **cert. denied**, 513 U.S. 1067 (1995).

[281] See **Boyde v. California**, 494 U.S. 370, 380 (1990); **Stewart v. Collins**, 978 F.2d 199, 201 (5th Cir. 1992), **cert. denied**, 507 U.S. 1053 (1993).

merited the death penalty, asserts a construction of the jury charge at the punishment phase of petitioner's trial that is neither reasonable nor likely to have actually occurred.[282] Furthermore, the Fifth Circuit has repeatedly rejected the exact same rule urged by petitioner herein.[283] There is no constitutional right to a jury instruction advising a capital sentencing jury of the effect of a hung jury.[284]

b. **Teague** Foreclosure

Finally, the Fifth Circuit has repeatedly held that expanding the holding in **Mills** to cover the Texas capital sentencing scheme, i.e., adopting the rule advocated by petitioner herein, would amount to adopting a "new rule" of constitutional procedure in the course of this federal habeas corpus proceeding and that the nonretroactivity doctrine of

---

[282] See **Johnson v. Texas**, 509 U.S. at 368 ("In evaluating the instructions, we do not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would -- with a 'commonsense understanding of the instructions in the light of all that has taken place at trial.'") (quoting **Boyde v. California**, 494 U.S. 370, 381(1990)).

[283] See **Woods v. Johnson**, 75 F.3d at 1036; **Jacobs v. Scott**, 31 F.3d at 1328-29.

[284] See **United States v. Jones**, 132 F.3d 232, 245 (5th Cir. 1998), **aff'd**, 527 U.S. 373 (1999) (holding that no constitutional violation results from the refusal of a district court to inform the jury of the consequences of failing to reach a unanimous verdict).

Teague forecloses such a result.[285] Expanding the holding in **Caldwell** to reach the same result would also run afoul of the rule in **Teague**. Neither the Supreme Court nor the Fifth Circuit has ever construed **Mills** or **Caldwell** to require the result petitioner requests herein.

3. AEDPA Review

For the reasons set forth above, the Texas Court of Criminal Appeals' rejection of petitioner's challenge to the jury instructions at the punishment phase of petitioner's 1981 capital murder trial was the product of neither an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States, nor an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore, petitioner's eighth claim does not warrant federal habeas relief under the AEDPA.

4. Conclusions

Petitioner possessed no federal constitutional right to an instruction advising the jury of the effect of a hung jury. Nothing in petitioner's punishment phase jury instructions could be reasonably construed as either confusing the jury with regard to the ultimate impact of their verdict or the ability of a single juror to vote his or her conscience based upon the evidence. Petitioner's punishment phase jury

---

[285] See **Woods v. Johnson**, 75 F.3d at 1036; **Davis v. Scott**, 51 F.3d 457, 466 (5th Cir.), **cert. denied**, 516 U.S. 992 (1995); **Webb v. Collins**, 2 F.3d 93, 95 (5th Cir. 1993); **Nethery v. Collins**, 993 F.2d at 1162; **Cordova v. Collins**, 953 F.2d 167, 172-73 (5th Cir.), **cert. denied**, 502 U.S. 1067 (1992).

instructions were guilty of neither of the vices condemned in **Caldwell** or **Mills**. Petitioner's eighth claim is not only without merit but also barred by the holding in **Teague**. Regardless of whether petitioner's eighth claim is reviewed under either a de novo standard or the AEDPA standard, it does not warrant federal habeas corpus relief in this cause.

I. Restrictions on Cross-Examination of Bearden

1. The Claims

In his penultimate claim for relief, petitioner argues the trial court erroneously limited the scope of the petitioner's cross-examination of prosecution witness Rhonda Jean Bearden when it refused to allow defense counsel to explore additional details concerning the criminal offenses for which she was incarcerated in Colorado at the time of petitioner's 1981 trial."[286] In addition, petitioner complains the trial court refused to allow petitioner to subpoena Bearden's robbery victims from Colorado to testify as to the details of her crimes in that State.[287]

2. De Novo Review

a. No Merits

(1) The Record Straight

Bearden was not a crucial prosecution witness. Bearden's trial testimony furnished little more than

---

[286] See Amended Petition at pp. 109-14; Reply Memorandum at pp. 21-22.

[287] See Amended Petition at p. 111.

corroboration for the much more compelling and far more damaging testimony of Franklin and Laursen. Petitioner does not complain that his ability to cross-examine either Franklin or Laursen was improperly curtailed. While Bearden testified petitioner confessed his crime to her and showed her money he claimed to have obtained during the robbery of his victims, Franklin testified not only to petitioner's confessions but also that petitioner directed her to clean the murder weapon, dispose of evidence, conceal the murder weapon among her belongings, and go to the crime scene the night of the murders to wipe off the petitioner's fingerprints.

At trial, in addition to corroborating the testimony of Franklin and Laursen regarding the group's activities in Galveston, Corpus Christi, and San Antonio, Bearden testified petitioner did not confess his robbery and murder of the two guards to her until after the group left San Antonio, and Franklin later corroborated the petitioner's confession.[288] On cross-examination, Bearden admitted (1) she had been working as a prostitute before she met the petitioner, (2) her father owned guns and she was familiar with them, (3) she never went to the crime scene the night of the murders, and (4) after initially denying that any promises had been made to secure her testimony, she stated she had been charged with nine felony counts in Colorado, including first degree kidnapping, multiple assault counts, aggravated robbery, aggravated motor vehicle theft, and participating in multiple criminal conspiracies, but allowed to enter into a plea bargain that provided she would plead guilty only to a single count of second degree kidnapping, receive a ten-to-twelve year

---

[288] See S.F. Trial, Volume 4, testimony of Rhonda Jean Bearden at pp. 284-89 and 340-41.

sentence, and then go free after serving only three years if she testified against the petitioner.[289]

After the jury was excused, petitioner's trial counsel interrogated Bearden regarding the details of her criminal conduct in Colorado, eliciting information that established (1) Bearden and Franklin lied to an elderly couple to gain entrance to their home and then tied up and robbed the elderly couple at gun point and (2) the following day, she and Franklin robbed at gun point a man they met at a bar, during which robbery Bearden struck the victim in the head with her gun in an unsuccessful attempt to render him unconscious, threatened to kill him, fired a shot, and fled with Franklin in the victim's car.[290]

Petitioner fails to offer any rational support for his assertion that the foregoing information showed that Bearden and Franklin's crimes in Colorado were in any manner similar to the murders of Powers and Ebbert. The two women's first robbery in Colorado was basically an armed burglary of an elderly couple during which neither of the victims were murdered. Their second robbery was of a man they picked up at a bar and, again, did not murder. This Court fails to find any rational connection, other than the fact a firearm was employed in those two robberies and in the murders of Powers and Ebbert, between the robberies carried out in Colorado by Bearden and Franklin and petitioner's murders of Ebbert and Powers. There was no common modus operandi in any of the three crimes, the victims were very dissimilar in each case, and the circumstances of each crime were totally different from one another. Most significantly, there was no

---

[289] Id. at pp. 303-22.

[290] Id. at pp. 322-29.

suggestion that Bearden and Franklin ever shot any of their robbery victims in the face or chest at point blank range as petitioner repeatedly confessed he did to Ebbert and Powers. Any arguable similarities between the robberies Bearden and Franklin committed in Colorado and the robberies of Powers and Ebbert were not only insignificant but irrelevant to the issue of whether the petitioner murdered Ebbert.

Petitioner's new assertion that Bearden was the one who murdered Ebbert is completely without evidentiary support either in the trial record, the record from petitioner's state habeas corpus proceeding, or even in the evidence petitioner purportedly wished to present at petitioner's trial. In fact, there was no evidence introduced at petitioner's trial showing Bearden had any involvement in the murders of either Powers or Ebbert. On the contrary, Seiver testified petitioner told him initially that Franklin had shot the two guards.[291] During her cross-examination, Franklin admitted (1) she had made an arrangement with prosecutors to secure her release from prison in Colorado in exchange for her testimony against petitioner and (2) she had threatened one of her victims in Colorado and told that victim she had killed before.[292] Bearden made no confession that she had ever shot any one or had ever bragged about killing any one. Bearden testified that she did not even learn of the murders of Powers and Ebbert until she saw a television news report about same,

---

[291] See S.F. Trial, Volume 4, testimony of Mark Stanley Seiver at p. 371. Neither Seiver nor any other witness at petitioner's trial testified petitioner had ever pointed the finger at Bearden.

[292] See S.F. Trial, Volume 5, testimony of Victoria Ann Franklin at pp. 194-95.

and when petitioner first confessed to her he had committed those murders, she did not believe him until he displayed the money he obtained in the robbery and Franklin corroborated his story.[293] Petitioner offered no evidence at either trial or his state habeas corpus hearing controverting Bearden's trial testimony on these matters. Likewise, despite the passage of many years since his 1981 conviction, petitioner offered no evidence at his state habeas hearing suggesting that anyone other than he murdered Ebbert.

(2) Confrontation Clause Claim

(a) The Constitutional Standard

The Confrontation Clause of the Sixth Amendment guarantees the right of the accused in a criminal prosecution to be confronted with the witnesses against him.[294] The primary purpose of confrontation is to secure the right of cross-examination.[295] Cross-examination is the principal means by which the credibility of a witness and the truth of his testimony are tested.[296] Exposing the witness' motivation in testifying is an important function of cross-examination.[297]

---

[293] See S.F. Trial, Volume 4, testimony of Rhonda Jean Bearden at pp. 279-80, 284-89, and 293-94.

[294] **Delaware v. Van Arsdall**, 475 U.S. 673, 678 (1986); **Davis v. Alaska**, 415 U.S. 308, 315 (1974).

[295] **Id.**

[296] **Davis v. Alaska**, 415 U.S. at 316.

[297] **Delaware v. Van Arsdall**, 475 U.S. at 678-79; **Davis v. Alaska**, 415 U.S. at 316-17.

Effective cross-examination can include not only delving into the witness's perceptions and memory, but also attempting to impeach or discredit the witness through evidence the witness (1) has a prior criminal conviction,[298] (2) made a prior statement inconsistent with his trial testimony,[299] (3) did not testify at trial from his own personal knowledge,[300] or (4) was biased, prejudiced, or otherwise had an ulterior motive for testifying as he did at trial.[301]

Nonetheless, trial judges retain wide discretion to impose reasonable limits on cross-examination based on concerns about harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant to the issues before the jury.[302] The Confrontation Clause guarantees an opportunity for effective cross-examination but not necessarily cross-examination that is effective in whatever way and to whatever extent the defense might wish.[303]

A criminal defendant states a violation of the Confrontation Clause by showing he was prohibited from

---

[298] See **Davis v. Alaska**, 415 U.S. at 316.

[299] See **Johnson v. Puckett**, 176 F.3d at 820.

[300] **Id.**

[301] See **Davis v. Alaska**, 415 U.S. at 316.

[302] See **Delaware v. Van Arsdall**, 475 U.S. at 679; **Johnson v. Puckett**, 176 F.3d at 820.

[303] **Delaware v. Van Arsdall**, 475 U.S. at 679; **Delaware v. Fensterer**, 474 U.S. 15, 20 (1985).

engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness and, thereby, to expose to the jury the facts from which the jury could appropriately draw inferences relating to the reliability of the witness.[304] Put more simply, the question is whether the jury was given adequate information to appraise the bias and motives of the witness.[305]

(b) Synthesis

At petitioner's 1981 trial, Bearden admitted during cross-examination (1) she had no personal knowledge of petitioner's offense and knew only what petitioner and Franklin had told her about same, (2) she had been charged with not less than nine felony offenses in Colorado, including aggravated kidnapping, multiple assaults, aggravated robbery, aggravated motor vehicle theft, and multiple criminal conspiracies, (3) she had been permitted to enter into an extremely favorable plea bargain under which she pleaded guilty only to a single count of second degree kidnapping and received a two-to-twelve year sentence, and (4) her sentence was to be reduced even further, to only three years, and she was to go free in exchange for her testimony against the

---

[304] **Delaware v. Van Arsdall**, 475 U.S. at 680; **Davis v. Alaska**, 415 U.S. at 318; **United States v. Mizell**, 88 F.3d 288, 293 (5th Cir.), **cert. denied**, 519 U.S. 1046 (1996).

[305] See **Johnson v. Puckett**, 176 F.3d at 820; **United States v. Mizell**, 88 F.3d at 293; **United States v. Cooks**, 52 F.3d 101, 104 (5th Cir. 1995) (holding that the constitutional right is not violated if the jury has sufficient information to appraise the bias and motives of the witness).

petitioner.[306] In addition, Bearden admitted she had engaged in acts of prostitution both before and after she met petitioner and both before and after the murders of Ebbert and Powers.[307]

Having carefully reviewed the entirety of Bearden's testimony, this Court concludes the trial court's refusal to permit defense counsel to explore the details of Bearden's criminal activities in Colorado did not deprive petitioner of the opportunity to expose the jury to all of the rational grounds for bias, as well as motives, Bearden possessed for testifying against the petitioner at his 1981 trial. The details of Bearden's extremely favorable plea bargain and the other benefits she was to receive in exchange for her testimony against petitioner were fleshed out in great detail. The fact she had no personal knowledge of the murder of Ebbert was likewise made clear to the jury. Because Bearden did not deny committing any of the offenses with which she was charged in Colorado, there was no additional impeachment value to be obtained by exploring the details of those offenses. No reasonable juror would have learned any thing of value in terms of Bearden's credibility from listening to her recount the details of her Colorado crimes. In short, petitioner's 1981 jury had more than sufficient information to appraise Bearden's bias and motives. The trial court did not violate petitioner's Confrontation Clause rights by precluding

---

[306] See S.F. Trial, Volume 4, testimony of Rhonda Jean Bearden at pp. 255, 279-80, 284-89, 306, 310-19, and 340-41.

[307] **Id.** at pp. 259, 261, 264, 298, and 306.

further cross-examination of Bearden with regard to the details of her Colorado offenses.[308]

Likewise, because none of the witnesses whom petitioner sought to subpoena from Colorado had any personal knowledge regarding petitioner's murder of Ebbert, the trial court's refusal to authorize subpoenas to bring the victims of Bearden and Franklin's Colorado crimes to Texas did not violate petitioner's Confrontation Clause rights. Petitioner does not allege that any of those witnesses could have furnished testimony that would have further impeached Bearden. Moreover, there is no authority for the proposition that a defendant's Confrontation Clause rights extend to allowing the opportunity to impeach a prosecution witness through the testimony of a witness favorable to the defense.[309]

---

[308] The Supreme Court's holding in **Davis v. Alaska**, is not nearly as broad as petitioner argues in his pleadings in this Court. **Davis** involved a state trial court's refusal to permit defense counsel to explore on cross-examination the fact that a prosecution witness was on probation and possibly feared revocation of same unless he testified favorably to the prosecution at Davis's trial. In contrast, petitioner's trial counsel was permitted to explore in the jury's presence both the numerous offenses with which Bearden had been charged in Colorado and the details of her extremely favorable plea bargain, including the fact she would go free almost as soon as she returned to Colorado after testifying against the petitioner.

[309] See **Johnson v. Puckett**, 176 F.3d at 821 (citing **Davis v. Alaska**, 415 U.S. at 315-16); **United States v. Kindig**, 854 F.2d 703, 709 (5th Cir. 1988).

(3) Compulsory Process Claim

(a) The Constitutional Standard

The Sixth Amendment provides in relevant part that in all criminal prosecutions, the accused shall enjoy the right to have compulsory process for obtaining witnesses in his favor.[310] At a minimum, criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before the jury evidence that might influence the determination of guilt.[311] However, the Sixth Amendment does not by its terms grant a criminal defendant the right to secure the attendance and testimony of any and all witnesses; it guarantees only compulsory process for obtaining witnesses in his favor.[312] To establish a violation of the Sixth Amendment right to compulsory process or the Fifth Amendment right to due process, a criminal defendant must make a plausible showing that the testimony of the witness would have been material

---

[310] **United States v. Soape**, 169 F. 3d 257, 268 (5th Cir.), **cert. denied**, 119 S. Ct. 2353 (1999).

[311] **Taylor v. Illinois**, 484 U.S. 400, 408 (1988); **Ritchie v. Pennsylvania**, 480 U.S. 39, 56 (1987); **United States v. Soape**, 169 F.3d at 268.

[312] See **United States v. Valenzuela-Bernal**, 458 U.S. 858, 867 (1982); **United States v. Soape**, 169 F.3d at 268; **United States v. Gonzales**, 79 F.3d 413, 424 (5th Cir.), **cert. denied sub nom. Muniz v. United States**, 519 U.S. 869 (1996).

and favorable to his defense in ways not merely cumulative to the testimony of available witnesses.[313]

(b) Synthesis

Insofar as petitioner complains the trial court's refusal to authorize subpoenas directed toward the victims of Bearden's crimes in Colorado violated petitioner's constitutional right to compulsory process, that claim fails for the simple reason that petitioner has alleged no facts showing any of the Colorado witnesses ever possessed any information regarding the petitioner's offense in San Antonio or relevant to the issue of Bearden's credibility. Petitioner does not allege any of the Colorado witnesses could have testified that either Bearden or Franklin ever confessed to the murder of Ebbert or Powers. Petitioner does not allege any of the Colorado witnesses could have testified either Bearden or Franklin ever made any statement regarding the murders of Ebbert or

---

[313] See **United States v. Valenzuela-Bernal**, 458 U.S. at 867-68 (applying the same materiality standard as in Brady claims and holding that the omitted testimony must be evaluated in the context of the entire record); **United States v. Romero-Cruz**, 201 F.3d 374, 377 (5th Cir. 2000); **United States v. Soape**, 169 F.3d at 268 (holding the duty is on the requesting party to demonstrate the necessity for the witness's testimony); **United States v. Gonzales**, 79 F.3d at 424 (holding the party requesting a subpoena has a duty to demonstrate the necessity of the witness's testimony); **United States v. Wallace**, 32 F.3d 921, 929 (5th Cir. 1994) (holding that the right to compulsory process does not entitle the defendant to subpoena witnesses whose testimony would be collateral, rather than material, to the issues in the case).

Powers in their presence. Petitioner does not allege any of the Colorado witnesses could have furnished testimony would have impeached any of the trial testimony of Bearden or Franklin. In fact, petitioner failed to present any evidence at the evidentiary hearing held in state court regarding what testimony, if any, the Colorado witnesses could have furnished at petitioner's 1981 trial. Petitioner's reliance on the Supreme Court's opinions in **Washington v. Texas**[314] and **Chambers v. Mississippi**[315] is misplaced. Neither of the fact situations involved in those two cases have any bearing on petitioner's case.

b. Harmless Error

Confrontation Clause claims are subject to the harmless error analysis.[316] Any error in either limiting the

---

[314] U.S. 14 (1967). In **Washington**, the Supreme Court struck down a Texas statute that prohibited a criminal defendant from calling a co-defendant, accomplice, accessory, or principal as a witness at trial. Obviously, the facts of petitioner's case were as far from the situation the Supreme Court confronted in **Washington** as is possible.

[315] 410 U.S. 284 (1973). In **Chambers**, the Supreme Court held a criminal defendant's rights to a fair trial were violated when a state trial court refused to permit the defense to call three witnesses who could have testified that a third person had confessed that he committed the offense with which the defendant was charged but later repudiated that confession. Petitioner does not allege that any of his Colorado witnesses could have offered similar testimony.

[316] **Delaware v. Van Arsdall**, 475 U.S. at 684.

scope of defense counsel's cross-examination of Bearden or in denying petitioner's request to bring Bearden's victims to San Antonio to recount their ordeals at the hands of Bearden and Franklin did not have a substantial and injurious effect on the outcome of either phase of the petitioner's trial. Bearden admitted to her many criminal activities in Colorado, and the details of her favorable plea bargain and additional agreement in exchange for her testimony against petitioner were presented to the jury. None of the witnesses whom petitioner wished to subpoena from Colorado have ever been alleged to have possessed any personal knowledge of any facts relevant to petitioner's guilt or to Bearden's credibility. The evidence of petitioner's guilt was overwhelming even if one totally and completely disregards the testimony of Rhonda Bearden, who learned all of what she knew about petitioner's crime from either petitioner or Franklin. The admission of testimony regarding petitioner's confessions to Franklin and Seiver made Bearden's testimony virtually superfluous.

3. AEDPA Review

For the reasons set forth above, the Texas Court of Criminal Appeals' rejections of petitioner's Confrontation Clause and Compulsory Process claims were the products of neither unreasonable applications of clearly established federal law, as determined by the Supreme Court of the United States, nor unreasonable determinations of the facts in light of the evidence presented in the state court proceeding. Therefore, petitioner's tenth claim does not warrant federal habeas relief under the AEDPA.

4. Conclusions

It was the testimony of his purported common law spouse, Victoria Franklin, and petitioner's purported common

law attorney, Mark Seiver, that established petitioner's guilt beyond a reasonable doubt. The testimony of Rhonda Bearden did little more than furnish hearsay corroboration for the testimony of those two witnesses. The trial court's refusal to permit defense counsel to bring witnesses from Colorado to testify about Bearden's criminal conduct in that jurisdiction, which Bearden never denied, was a reasonable exercise of that court's authority to limit cross-examination on only marginally relevant matters and to insist that a party requesting a subpoena show the potential witness to be subpoenaed could furnish material evidence. In any event, given the overwhelming evidence of petitioner's guilt, any error committed by the state trial court in ruling on these matters was harmless as a matter of federal habeas law.

J. Cumulative Error

1. The Claim

In his final claim for relief herein, petitioner argues the cumulative impact of the purported violations of petitioner's constitutional rights discussed above warrants federal habeas corpus relief.[317]

2. De Novo Review

The problem with petitioner's cumulative error claim is that none of petitioner's first ten claims for relief presents a substantial federal constitutional issue. Several of petitioner's claims for relief are founded on factually inaccurate premises. Many of his claims are only assertions of unfairness in a trial in which the evidence of guilt was overwhelming and in

---

[317] See Amended Petition at pp. 114-18; Reply Memorandum at p. 23.

which there was no genuine dispute as to either the deliberate nature of petitioner's crime or petitioner's well-settled track record for violence, both inside and out of prison facilities. There was nothing unfair about petitioner's trial. Likewise, petitioner's federal constitutional rights were not violated by the ensuing delay of nearly two decades, during which time petitioner has been confined in conditions which satisfy constitutional standards.

Federal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where (1) the individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors so infected the entire trial that the resulting conviction violates due process.[318] The cumulative error doctrine provides relief only when the constitutional errors committed in the state trial court so fatally infected the trial that they violated the trial's fundamental fairness.[319] Insofar as petitioner asserts a "cumulative error" theory as a separate ground for relief, that argument is foreclosed by the Fifth Circuit's opinion in **Derden v. McNeel**[320] and its progeny. In order to satisfy the cumulative error rule in the Fifth Circuit, a federal habeas petitioner must show (1) the state trial court actually committed errors, (2) the errors are not procedurally

---

[318] **Nichols v. Scott**, 69 F.3d at 1275 (quoting **Derden v. McNeel**, 978 F.2d 1453, 1454 (5th Cir. 1992), **cert. denied**, 508 U.S. 960 (1993)).

[319] **Spence v. Johnson**, 80 F.3d 989, 1000 (5th Cir.), **cert. denied**, 519 U.S. 1012 (1996).

[320] 978 F.2d 1453 (5th Cir. 1992), **cert. denied**, 508 U.S. 960 (1993).

barred, (3) the errors rise to the level of constitutional deprivations, and (4) the record as a whole reveals that an unfair trial resulted from those errors.[321] As this Court's discussion of the many details of petitioner's trial set forth at length above makes clear, none of the alleged errors by petitioner's state trial court or alleged deficiencies in the performance of petitioner's counsel identified by petitioner rise to the level of a violation of petitioner's constitutional rights and the record of petitioner's trial, as a whole, reveals that proceeding was not unfair in any constitutional sense. In this case, petitioner attempts to rely upon the collective force and effect of the various alleged errors committed by his state trial court in presiding over petitioner's capital murder trial as an independent basis for federal habeas relief. However, a petitioner who attempts to cumulate trial court errors that do not rise to the federal constitutional dimension has presented nothing to cumulate.[322] As the Fifth Circuit once succinctly put it, "[t]wenty times zero equals zero."[323] For the foregoing reasons, petitioner's final ground for relief is without merit.

3. AEDPA Review

For the reasons set forth above, the Texas Court of Criminal Appeals' rejection of petitioner's federal cumulative error claim was the product of neither an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States, nor an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Therefore,

---

[321] See **Derden v. McNeel**, 978 F.2d at 1458.

[322] See **Yohey v. Collins**, 985 F.2d 222, 229 (5th Cir. 1993).

[323] **Mullen v. Blackburn**, 808 F.2d at 1147.

petitioner's final claim does not warrant federal habeas relief under the AEDPA.

4. Conclusions

Because the petitioner's trial was conducted in a fundamentally fair manner and because none of his claims for federal habeas relief independently present even an arguable ground for same, petitioner's attempt to rely upon the cumulative effect of same does not warrant federal habeas relief.

IV. Request for a Federal Evidentiary Hearing

Petitioner's request for an evidentiary hearing in this Court is premised upon the conclusory assertion that the extensive evidentiary hearing held in petitioner's state habeas corpus proceeding was "a sham" because the state trial court merely adopted the proposed findings of fact and conclusions of law submitted by the State. Petitioner has not, however, alleged any specific facts showing he was prevented in any way from developing or presenting any evidence during the course of his state habeas corpus hearing. Moreover, petitioner has not alleged any facts showing he was precluded from challenging any of the state trial court's factual findings or conclusions of law when his state habeas corpus proceeding reached the Texas Court of Criminal Appeals. Thus, petitioner has failed to establish he was denied a full and fair hearing before the state courts. While this Court, out of an abundance of caution, has eschewed the narrow standard of review mandated by the AEDPA in the course of analyzing petitioner's claims herein, the AEDPA still sets the standard for determining when an evidentiary hearing may be had in federal court.

The AEDPA significantly restricts the scope of federal habeas review of state court fact findings[324] and limits the circumstances in which a habeas corpus petitioner can obtain an evidentiary hearing in federal court.[325] Under the AEDPA, a state court's factual findings are entitled to a presumption of correctness which the federal habeas petitioner must rebut by clear and convincing evidence. Petitioner has identified no clear and convincing evidence in the record before this Court sufficient to rebut any of the state court's factual findings. Nor would such evidence be of much value. For, as this Court's discussion above points out, the vast majority of petitioner's claims herein are foreclosed by virtue of well-settled legal principles and not because of the findings of the state habeas court, in addition to this court's de novo review of petitioner's claims. This Court made its own factual findings in the course of rejecting petitioner's claims and

---

[324] See **Williams v. Cain**, 125 F.3d at 277(recognizing that under the AEDPA, state court factual findings "shall be presumed correct unless rebutted by 'clear and convincing evidence'"); **Hernandez v. Johnson**, 108 F.3d at 558 & n.4 (holding that under the AEDPA, the proper forum for the making of all factual determinations in habeas cases will shift to the state courts "where it belongs" and recognizing that the AEDPA clearly places the burden on the federal habeas petitioner "to raise and litigate as fully as possible his potential federal claims in state court"); 28 U.S. C. § 2254 (e) (1).

[325] See **Robison v. Johnson**, 151 F.3d at 269; **McDonald v. Johnson**, 139 F.3d 1056, 1059 (5th Cir. 1998); 28 U.S.C. §2254 (e) (2).

finds no basis for allowing petitioner further factual development on any of his claims at this juncture.[326]

Likewise, under the AEDPA, a federal habeas petitioner who has failed to develop the factual basis for a claim in state court is not entitled to an evidentiary hearing unless (1) the claim relies on either a new rule of constitutional law, previously unavailable, made retroactive to cases on collateral review or a factual predicate that could not have previously been discovered through the exercise of due diligence and (2) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable fact-finder would have found the petitioner guilty of the underlying offense.[327] A petitioner does not fail to develop a factual predicate unless the undeveloped record is a result of his own decision or omission.[328] The rare situations in which a hearing is still necessary under post-AEDPA law include those in which the Texas Court of Criminal Appeals either explicitly or implicitly rejected state trial court factual findings on a critical issue.[329] During petitioner's state habeas corpus

---

[326] Simply put, petitioner has failed to allege any additional facts not already in the record which, if proven, would entitle him to federal habeas corpus relief. Therefore, petitioner is not entitled to an evidentiary hearing. See **Clark v. Johnson**, 202 F.3d 760, 765-67 (5th Cir. 2000); **Perillo v. Johnson**, 79 F.3d 441, 444 (5th Cir. 1996).

[327] See 28 U.S.C. § 2254 (e) (2).

[328] **McDonald v. Johnson**, 139 F.3d at 1059.

[329] See **Singleton v. Johnson**, 178 F.3d 381, 385(5th Cir. 1999); **Goodwin v. Johnson**, 132 F.3d 162, 182 (5th Cir. 1997).

hearing, petitioner's counsel promised to present to the state trial court evidence from persons who had personal knowledge of the procedures employed during lethal injections in Texas. For reasons not clear from the record now before this Court, petitioner failed to do so. Petitioner is not entitled to a federal evidentiary hearing for the purpose of developing such evidence at this juncture. As explained above, petitioner has failed to establish he was denied a full and fair opportunity to present such evidence in the course of his state habeas corpus proceeding.

V. Certificate of Appealability

Under the AEDPA, an appeal may not be taken from the denial of a petition for federal habeas corpus relief unless a certificate of appealability is issued.[330] The AEDPA converted the "certificate of probable cause" that was required as a prerequisite to an appeal from the denial of a petition for federal habeas corpus relief into a "certificate of appealability."[331] Under the AEDPA, appellate review of a habeas petition is limited to the issues on which a certificate of appealability ["CoA"] is granted.[332] The CoA requirement

---

[330] See **Hicks v. Johnson**, 186 F.3d at 636; **Lamb v. Johnson**, 179 F.3d at 356; **Davis v. Johnson**, 158 F.3d at 809.

[331] See **Hill v. Johnson**, 114 F.3d 78, 80 (5th Cir. 1997) (recognizing that the "substantial showing" requirement for a CoA under the AEDPA is merely a change in nomenclature from the CPC standard); **Muniz v. Johnson**, 114 F.3d 43, 45 (5th Cir. 1997) (holding that the standard for obtaining a CoA is the same as for a CPC).

[332] See **Lackey v. Johnson**, 116 F.3d 149, 151 (5th Cir. 1997) (holding that the scope of appellate review of denial

supersedes the previous requirement for a certificate of probable cause to appeal for federal habeas corpus petitions filed after the effective date of the AEDPA.[333] A CoA is granted or denied on an issue-by-issue basis, thereby limiting appellate review to those issues on which CoA is granted alone.[334] A CoA will not be granted unless petitioner makes a substantial showing of the denial of a constitutional right.[335] To make such a showing, petitioner need not show he should prevail on the merits, but rather must demonstrate the issues are debatable among jurists of reason; that a court could

---

of habeas petition limited to issue on which CoA granted); **Santee v. Quinlan**, 115 F.3d 355, 357 (5th Cir. 1997) (holding that CoA necessary to appeal denial of habeas petition).

[333] See **Robison v. Johnson**, 151 F.3d at 259 n.2; **Hallmark v. Johnson**, 118 F.3d at 1076.

[334] See **Lackey v. Johnson**, 116 F.3d at 151; **Hill v. Johnson**, 114 F.3d at 80; **Muniz v. Johnson**, 114 F.3d at 45; **Murphy v. Johnson**, 110 F.3d 10, 11 n.1 (5th Cir. 1997); 28 U.S.C. §2253 (c) (3).

[335] See **Barefoot v. Estelle**, 463 U.S. 880, 893 (1983); **Miller v. Johnson**, 200 F.3d at 280; **Hicks v. Johnson**, 186 F.3d at 636; **Lamb v. Johnson**, 179 F.3d at 356; **Sonnier v. Johnson**, 161 F.3d 941, 943 (5th Cir. 1998); **Davis v. Johnson**, 158 F.3d at 809; **Whitehead v. Johnson**, 157 F.3d 384, 386 (5th Cir. 1998); **Robison v. Johnson**, 151 F.3d at 262; **Corwin v. Johnson**, 150 F.3d at 471; **Hallmark v. Johnson**, 118 F.3d at 1076; **Lackey v. Johnson**, 116 F.3d at 151; **Washington v. Johnson**, 90 F.3d 945, 949 (5th Cir. 1996), **cert. denied**, 520 U.S. 1122 (1997).

resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.[336]

For the reasons set forth at length above, this Court concludes that none of the petitioner's claims for relief herein satisfy the standard for a Certificate of Appealability. Even under the less narrow, de novo, standard of review, all of petitioner's claims herein are foreclosed by well-settled legal principles. Moreover, petitioner's first through fifth, seventh, eighth, and eleventh claims are also foreclosed by the nonretroactivity doctrine of **Teague**. Petitioner's first, third, fifth, sixth, ninth, and tenth claims are little more than assertions of harmless error.

Petitioner's initial claim is not merely an assertion of harmless error that is foreclosed by **Teague** but a demand for a jury instruction that would have actually harmed petitioner's chances of obtaining a negative answer to the future dangerousness special issue.[337] Petitioner's Penry claim is premised upon evidence which has never been recognized in this Circuit as warranting instructions required by that Supreme Court holding.[338] Petitioner's purported

---

[336] See **Barefoot v. Estelle**, 463 U.S. at 893 n.4; **Miller v. Johnson**, 200 F.3d at 280; **Hicks v. Johnson**, 186 F.3d at 636; **Lamb v. Johnson**, 179 F.3d at 356; **Davis v. Johnson**, 158 F.3d at 809; **Hallmark v. Johnson**, 118 F.3d at 1076; **Washington v. Johnson**, 90 F.3d at 949.

[337] Petitioner's complaints about the absence of a parole instruction were rejected by this Court and the Fifth Circuit in the case of Norman Evans Green. The rule he requests is also barred by **Teague**.

[338] In fact, this Court's independent, de novo, review of the trial record disclosed that there was absolutely no **Penry**

Witherspoon claim is premised upon a misrepresentation of the facts surrounding the exclusion of venire member Noble.[339] Petitioner's complaints about the manner in which lethal injection is carried out in Texas is without evidentiary support and, when carefully examined, amounts to a demand for a written protocol, rather than constitutional procedures.[340] Petitioner's ineffective assistance claims are identical to those that have been uniformly rejected in this Circuit for more than a decade. Petitioner's complaints about the admission of evidence and the prosecutor's jury arguments are without merit. Petitioner's complaint about the delay in his execution he has obtained from state and federal courts is without merit. Petitioner's challenge to the Texas capital sentencing scheme's twelve/ten rule is likewise foreclosed by well-settled case law. Petitioner's complaints about Bearden's

---

evidence introduced during petitioner's 1981 trial. This is not surprising since petitioner's trial counsel testified that he made an informed, strategic decision not to introduce such evidence for fear it would hurt petitioner's chances of obtaining a favorable answer on the future dangerousness issue.

[339] Even a cursory review of the voir dire examination of Mr. Noble reveals that the holding in **Witherspoon** is as germane to the petitioner's case as the Supreme Court's holding in **Plessy v. Ferguson.**

[340] Petitioner's "as currently administered" challenge to lethal injections in Texas fails because petitioner failed to introduce any evidence showing precisely how lethal injections were, in fact, "currently administered" in Texas. Petitioner's demand for a written protocol does not present a constitutional issue and is foreclosed by **Teague**.

cross-examination are likewise without merit, as is his cumulative error claim.

Given the limitations on the scope of this Court's review of petitioner's claims imposed by the AEDPA, the propriety of the state courts' rejection of petitioner's claims herein are not arguable among jurists of reason. Moreover, as explained above, even if this Court were to undertake a de novo review of each of petitioner's claims herein, petitioner's claims are neither debatable among jurists of reason, capable of rational resolution in a manner different from that set forth above by this Court, nor deserving of encouragement to proceed further. Therefore, this Court will deny petitioner a CoA to appeal in this cause.[341]

Accordingly, it is hereby **ORDERED** that:

1. All relief requested in petitioner's amended federal habeas corpus petition, filed December 10, 1998,[342] is **DENIED**.

2. Petitioner is **DENIED** a Certificate of Appealability.

3. That portion of this Court's Order, issued August 31, 1998,[343] staying petitioner's execution is

---

[341] This denial is, of course, without prejudice to petitioner's right to seek a CoA from the Fifth Circuit in the event petitioner files a timely Notice of Appeal in this cause.

[342] See docket entry no. 15.

[343] See docket entry no. 7.

VACATED and the stay of execution contained therein is **RESCINDED**.

4. The Clerk shall prepare and enter a Judgment in conformity with this Memorandum Opinion and Order.

IT is so ORDERED.

SIGNED this 28th day of March, 2000.

/s/ Fred Biery
FRED BIERY
UNITED STATES DISTRICT JUDGE

CONSTITUTIONAL PROVISIONS AT ISSUE

AMENDMENT V TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defence.

AMENDMENT VIII TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*

AMENDMENT XIV, SECTION 1 TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

Court of Criminal Appeals of Texas,
En Banc.

Miguel A. RICHARDSON, Appellant,
v.
The STATE of Texas, Appellee.

No. 68934.

June 1, 1994.
Rehearing Denied Sept. 21, 1994.
Certiorari Denied June 26, 1995. See 115 S.Ct. 2617.

Defendant was convicted in the 175th Judicial District Court, Bexar County, Preston H. Dial, Jr., J., of capital murder, and he appealed. The Court of Criminal Appeals, 744 S.W.2d 65, affirmed. On petition for writ of certiorari, the United States Supreme Court, 492 U.S. 914, 109 S.Ct. 3235, vacated and remanded. On remand, the Court of Criminal Appeals again affirmed. On petition for writ of certiorari, the United States Supreme Court, 113 S.Ct. 3026, again vacated and remanded. On remand, the Court of Criminal Appeals, McCormick, J., held that: (1) evidence of defendant's voluntary service and kindness to others, artistic and poetic talent, and religious devotion, did not require separate special jury charge during punishment phase, and (2) allegedly mitigating evidence of defendant's character and upbringing did not require separate special jury charge.

Judgment affirmed.

Maloney, J., concurred in the result.

Clinton, J., filed a dissenting opinion.

West Headnotes

[1] **Homicide** 311
203k311

Evidence of defendant's voluntary service and kindness to others, artistic and poetic talent, and religious devotion, could have been used by jury in answering special issue in capital murder trial and, thus, such allegedly mitigating evidence did not require separate special jury charge during punishment phase.

[2] Sentencing and Punishment 1780(3)
350Hk1780(3)
(Formerly 203k311)

Allegedly mitigating evidence of defendant's character and strict upbringing did not require separate special jury charge during punishment phase of capital murder trial, absent showing that commission of murder and other crimes was in any way attributable to allegedly mitigating factors, and absent long-held societal belief that such factors could reduce culpability.

***941** Allen Cazier, San Antonio, Steven B. Rosenfeld, New York City (Maria H. Bainor, of counsel), for appellant.

Fred G. Rodriguez, Dist. Atty., and Keith Burris, Steve Hilbig, James L. Bruner and Daniel Thornberry, Asst. Dist. Attys., San Antonio, Robert Huttash, State's Atty., Austin, for State.

Before the court en banc.

OPINION ON SECOND REMAND
FROM THE UNITED STATES SUPREME COURT

McCORMICK, Presiding Judge.

This case is here on second remand from the United States Supreme Court for us again to consider appellant's *Penry* [FN1] claim in light of *Johnson v. Texas*, 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993). We affirmed appellant's conviction on the first remand and held the trial court did not err in failing to submit appellant's requested *Penry* charge at the punishment phase of his trial. *Richardson v. State*, 886 S.W.2d 769 (Tex.Cr.App.1991). We again affirm.

FN1. 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

In *Johnson*, the Supreme Court reaffirmed its prior decisions that in the context of a facial challenge, Texas law sufficiently limits the factfinder's discretion in imposing the death penalty so it is not arbitrarily imposed, while Texas law also provides the factfinder sufficient discretion to give effect to a defendant's "relevant mitigating evidence" in making an individualized assessment of whether the death penalty is appropriate. See *Johnson*, 509 U.S. at ---- - ----, ----, 113 S.Ct. at 2666-68, 2672. The Supreme Court also ***942** reaffirmed prior decisional law that the States may constitutionally channel the factfinder's consideration of "relevant mitigating evidence" as long as the States do not place this evidence

completely beyond the factfinder's effective reach. *Johnson*, 509 U.S. at ----, ----, 113 S.Ct. at 2669, 2672.

Johnson held the relevant mitigating evidence of Johnson's youth was not placed beyond the factfinder's effective reach in answering special issue two; therefore, Johnson was not entitled to a *Penry* charge. *Johnson*, 509 U.S. 350, ----, 113 S.Ct. at 2669, 2672. *Johnson* distinguished *Penry* because Penry's relevant mitigating evidence of his severe mental retardation and childhood abuse, which rendered Penry unable to learn from his mistakes, could not have been given any mitigating effect under special issue one, and could only have been given "aggravating" effect under special issue two; therefore, the special issues placed Penry's "relevant mitigating evidence" completely beyond the factfinder's effective reach. See *Johnson*, 509 U.S. at ---- - ----, 113 S.Ct. at 2667-69; *Penry*, 492 U.S. at 322-24, 109 S.Ct. at 2948-49. *Penry* says a defendant presents "relevant mitigating evidence" when he presents evidence that his criminal acts "are attributable to a disadvantaged background, or to emotional and mental problems."

"If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.' " *Penry*, 492 U.S. at 319, 109 S.Ct. at 2947.

[1] Here, in support of his claim that he was entitled to a *Penry* charge, appellant relies on evidence of his "voluntary service and kindness to others," "artistic and poetic talent," and "religious devotion." *Richardson*, 886 S.W.2d at 772-776. The jury could have used this evidence to answer "no" to special issue two. Therefore, the special issues did not place this evidence beyond the effective reach of the factfinder. See *Johnson*, 509 U.S. at ----, 113 S.Ct. at 2669.

[2] Appellant also claims he presented evidence of "childhood abuse and mental and emotional impairment," which made him, like Penry, "unable to learn from his mistakes." Compare *Johnson*, 509 U.S. at ----, 113 S.Ct. at 2667. We disagree, and after having once again reviewed the relevant portions of the record, we conclude most of the evidence appellant presented "is really nothing more than evidence of a strictly rule-governed upbringing." [FN2] See *Richardson*, 886 S.W.2d at 777 (Benavides, J., concurring). This evidence and the other evidence upon which appellant relies is not "relevant mitigating evidence" under *Penry* because appellant has made no showing that his commission of this crime and other crimes was in any way attributable to these factors. See *Penry*, 492 U.S. at 319, 109 S.Ct. at 2947. We also are unaware of any long-held societal belief that one who commits criminal acts that are attributable to these factors "may be less culpable than defendants who have no such excuse." See *id.* Therefore, appellant was not entitled to a *Penry* charge.

FN2. Appellant also relies on evidence which he claims shows his unwillingness to be touched, his

> need to indulge in constant self- aggrandizement, his dressing in women's clothing, his reading problems, his problems in high school with racial integration of the public schools, his father's strict discipline in the home, and his leaving home and dropping out of school at an early age because of a bad relationship with his father. The evidence of appellant dressing in women's clothes came from witnesses who said he did this to facilitate the commission of his crimes.

The trial court's judgment is affirmed.

MALONEY, J., concurs in the result.

WHITE, J., not participating.

CLINTON, Judge, dissenting.

Twice this cause has been remanded to this Court by the United States Supreme Court. First the Supreme Court remanded the cause with instructions to reconsider it in light of its holding in *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). That done, the cause was again taken ***943** to the Supreme Court on petition for certiorari. Now the cause is before us again, remanded for reconsideration in light of *Johnson v. Texas*, 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993). In *Johnson* the Supreme Court put the finishing touches on a stunning piece of revisionism, recasting *Penry* to mean something it clearly does not. See *Elliott v. State*, 858 S.W.2d 478, at 492-98 (Tex.Cr.App.1993) (Clinton, J., dissenting). Accordingly, the Court has recently observed that so long as evidence proffered

in mitigation of punishment can be given any mitigating application at all under the special issues contained in former Article 37.071(b), V.A.C.C.P., the Eighth Amendment does not require an additional jury instruction on mitigating evidence, as was required in *Penry. Ex parte Davis*, 866 S.W.2d 234 (Tex.Cr.App.1993). The majority today is correct, then, to inquire whether appellant's proffered evidence may be considered mitigating within the confines of the special issues, for that is surely the reconsideration in light of *Johnson* that the Supreme Court contemplated.

The majority concludes that appellant's evidence of "voluntary service and kindness to others," of his "artistic and poetic talent," and of his "religious devotion" could all be given some mitigating effect under the second special issue. Indeed, the majority had already concluded as much in its opinion following the first remand, at least as to appellant's evidence of service and kindness to others, and of religious devotion. It is puzzling, though, that the majority so readily concludes that the evidence of appellant's artistic and poetic talent is covered by the second special issue, considering that on the first remand the Court expressly eschewed such a rationale in rejecting that portion of appellant's contention. In any event, it is not apparent to me that artistic and poetic talent has any relevance whatsoever, aggravating or mitigating, to the issue of future dangerousness. The majority's conclusion that it does bears some explanation. None is forthcoming.

The majority also concludes that appellant is not entitled to a *Penry* instruction on account of evidence of childhood abuse

and disadvantaged background. I continue to believe, as I did at the time of the first remand, that appellant has presented no evidence of an abused childhood. It does seem to me, however, that he presented at least marginally colorable evidence of a disadvantaged background. That evidence has no mitigating significance within the scope of the statutory special issues. Thus, the holding in *Johnson* is not implicated. The majority today therefore disposes of this claim, not according to *Johnson,* but by rote invocation of its own "homemade 'nexus' requirement[.]" *Elliott v. State,* supra, at 492. That approach is not supported by either *Johnson* or *Penry.* Therefore, as in *Lackey v. State,* 819 S.W.2d 111, at 138 (Tex.Cr.App.1991) (On appellant's motion for rehearing) (Clinton, J., dissenting), *Goss v. State,* 826 S.W.2d 162, at 169 (Tex.Cr.App.1992) (Clinton, J., dissenting), and *Ex parte Bower,* 823 S.W.2d 284, at 291 (Tex.Cr.App.1991) (Clinton, J., dissenting), I respectfully dissent.

END OF DOCUMENT

Court of Criminal Appeals of Texas,
En Banc.

Miguel A. RICHARDSON, Appellant,
v.
The STATE of Texas, Appellee.

No. 68934.

June 12, 1991.
Rehearing Denied Sept. 18, 1991.

Defendant was convicted in the 175th Judicial District Court, Bexar County, Preston H. Dial, Jr., J., of capital murder, and he appealed. The Court of Criminal Appeals, affirmed, 744 S.W.2d 65, and defendant petitioned for writ of certiorari. The United States Supreme Court, 492 U.S. 914, 109 S.Ct. 3235, 106 L.Ed.2d 583, vacated and remanded. On remand, the Court of Criminal Appeals, McCormick, P.J., held that evidence at sentencing hearing concerning defendant's kindness to others, artistic and poetic talent, childhood abuse and religious devotion did not require special *Penry* instruction on mitigating evidence.

Affirmed.

Benavides, J., filed opinion concurring in judgment.

Campbell, J., concurred in result.

Clinton, J., filed dissenting opinion in which Maloney, J., joined.

Baird, J., dissented.

West Headnotes

[1] Homicide 311
203k311

[1] Sentencing and Punishment 1784(4)
350Hk1784(4)
(Formerly 203k357(4))

Evidence in sentencing phase of capital murder trial, that defendant was a friend of a witness who suffered from diabetes and was losing her eyesight as a result and had expressed concern over the witness' condition, was not mitigating evidence that was either not relevant to special verdict issues or had relevance to defendant's moral culpability beyond scope of special verdict questions that required special *Penry* instruction; jury had opportunity to give effect to witness' testimony through special issue regarding future dangerousness. (Per opinion of McCormick, J., with two Judges concurring in result, three Judges dissenting, and one Judge not participating.) U.S.C.A. Const.Amend. 8.

[2] Homicide 311
203k311

[2] Sentencing and Punishment 1784(4)
350Hk1784(4)
(Formerly 203k357(4))

Evidence at sentencing phase of capital murder trial, that defendant's letters, drawings and poetry gave 14-year-old girl a different perspective on life and that defendant was a nonviolent person was not mitigating evidence that was either not relevant to special verdict issues or had relevance to defendant's moral culpability beyond scope of special verdict questions, so as to require special *Penry* instruction; witness' testimony went directly to question of future dangerousness, and jury had opportunity to give mitigating effect to evidence through special issue. (Per opinion of McCormick, J., with two Judges concurring in result, three Judges dissenting, and one Judge not participating.) U.S.C.A. Const.Amend. 8.

[3] Sentencing and Punishment ⚿1721
350Hk1721

(Formerly 203k357(4))

Evidence at sentencing phase of capital murder trial concerning defendant's artistic and poetic talent had no mitigating value in sense that it was relevant to jury making "reasoned moral response" in voting on special issues and did not have particular relevance to defendant's moral culpability outside special issues. (Per opinion of McCormick, J., with two Judges concurring in result, three Judges dissenting, and one Judge not participating.) U.S.C.A. Const.Amend. 8.

[4] Homicide ⚿311
203k311

[4] Sentencing and Punishment 1772
350Hk1772
(Formerly 203k357(4))

Evidence at sentencing phase of capital murder trial that defendant's father was a strict disciplinarian was insufficient to establish that defendant came from abused background, so as to require special *Penry* instruction on mitigating evidence. (Per opinion of McCormick, J., with two Judges concurring in result, three Judges dissenting, and one Judge not participating.) U.S.C.A. Const.Amend. 8.

[5] Sentencing and Punishment 1756
350Hk1756
(Formerly 203k357(4))

Evidence at sentencing phase of capital murder trial that social turmoil stunted defendant's educational development and that defendant's teacher called him names did not have significance to defendant's moral capability beyond special issues or any relevance to first two special issues. (Per opinion of McCormick, J., with two Judges concurring in result, three Judges dissenting, and one Judge not participating.) U.S.C.A. Const.Amend. 8.

[6] Homicide 311
203k311

[6] Sentencing and Punishment 1769
350Hk1769
(Formerly 203k357(6), 203k357(4))

[6] Sentencing and Punishment 1780(3)
350Hk1780(3)
(Formerly 203k357(6))

Testimony of clinical psychologist at sentencing phase of capital murder trial that hypothetical "personality" based on facts of defendant's case would be likely to commit future acts of violence went directly to question of future dangerousness and did not require special *Penry* instruction on mitigating evidence. (Per opinion of McCormick, J., with two Judges concurring in result, three Judges dissenting, and one Judge not participating.) U.S.C.A. Const.Amend. 8.

[7] Sentencing and Punishment 1780(3)
350Hk1780(3)
(Formerly 203k357(4), 203k311)

Evidence at sentencing phase of capital murder trial that defendant had difficulty learning to read did not require *Penry* instruction on mitigating evidence. (Per opinion of McCormick, J., with two Judges concurring in result, three Judges dissenting, and one Judge not participating.) U.S.C.A. Const.Amend. 8.

[8] Homicide 311
203k311

[8] Sentencing and Punishment 1784(4)
350Hk1784(4)
(Formerly 203k357(4))

[8] Sentencing and Punishment 1756
350Hk1756
(Formerly 203k357(6))

[8] Sentencing and Punishment 1780(3)
350Hk1780(3)
(Formerly 203k357(6))

Evidence at sentencing phase of capital murder trial concerning defendant's religious devotion while incarcerated was relevant to special issue of future dangerousness and did not require special *Penry* instruction on mitigating evidence. (Per opinion of McCormick, J., with two Judges concurring in result, three Judges dissenting, and one Judge not participating.) U.S.C.A. Const.Amend. 8.

***771** Allen Cazier, San Antonio, Steven B. Rosenfeld, New York City, for appellant.

Fred G. Rodriguez, Former Dist. Atty., Edward F. Shaughnessy, III, Keith Burris, Steve Hilbig, James L. Bruner, Daniel Thornberry, Asst. Dist. Attys., San Antonio, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

McCORMICK, Presiding Judge.

Appellant, Miguel A. Richardson, was convicted of capital murder and the death penalty was assessed. This Court affirmed the conviction holding in part that appellant's contention that the trial court erred in refusing his requested charges on mitigation had no merit. *Richardson v. State*, 744 S.W.2d 65, 85 (Tex.Cr.App.1987).

Appellant challenged our holding in the Supreme Court of the United States. That Court, 492 U.S. 914, 109 S.Ct. 3235, 106 L.Ed.2d 583 summarily granted appellant's petition for writ of certiorari, vacated the judgment of this Court and remanded the case to us to consider appellant's allegations in light of *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). We again affirm the conviction. [FN1]

> FN1. We will not review appellant's second point of error. It is outside the scope of the Supreme Court's remand order.

In *Penry*, the United States Supreme Court held that the petitioner's mental retardation and history of child abuse constituted mitigating evidence that either was not relevant to the Texas special verdict issues or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions. *Penry*, 492 U.S. at 323, 109 S.Ct. at 2949. In the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's

mental retardation and abused background by declining to impose the death penalty, the Supreme Court concluded that the jury did not have a vehicle to express its "reasoned moral response" to its sentencing decision. *Penry*, 492 U.S. at 326, 109 S.Ct. at 2951. Justice O'Connor writing for the majority emphasized that:

"[I]t is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned *moral* response to the defendant's background, character, and crime.' " (emphasis in original) (citations omitted) *Penry*, 109 S.Ct. at 2951.

Our analysis will also consider *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988) (plurality opinion) and *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). We think it appropriate to give consideration to the time when evidence that has been termed "mitigating" occurred. Justice White, writing for the plurality in *Franklin*, specifically referred to *Skipper* when discussing the relevance of a prison disciplinary record. He wrote:

"Indeed, our discussion in Skipper of the relevancy of such disciplinary record evidence in capital sentencing decisions dealt exclusively with the question of how such evidence reflects on a defendant's likely future behavior.... [S]kipper's

discussion of the proper use of a defendant's prison *772 disciplinary record in a jury's sentencing decision focused precisely on the way in which such evidence is encompassed by the Texas future dangerousness question, and on the Court's previous decision in Jurek." *Franklin*, 487 U.S. at 178, 108 S.Ct. at 2329.

We will now consider whether the appellant is correct in his contention that the evidence he presents is, in fact, *Penry* evidence and whether a special instruction should have been granted so that the jury could have made a "reasoned moral response" in answering our special issues. The case may be that appellant's evidence falls under the ambit of *Penry*, is *Franklin* evidence, or has no mitigating value at all in the context of his capital murder punishment phase.

Appellant has grouped what he wishes us to consider "mitigating evidence" into five categories for our consideration. The categories are:
(1) Voluntary service and kindness to others;
(2) Religious devotion;
(3) Artistic and poetic talent;
(4) Family ties; and
(5) Childhood abuse; mental and emotional impairment.

We will now examine the evidence under each category in light of *Penry* and *Franklin*.

VOLUNTARY SERVICE AND KINDNESS TO OTHERS

[1] Linda Cowart testified that she met the appellant at a Sambo's restaurant in Denver, Colorado. Cowart characterized

their relationship as a "friendship" and that they talked about "people going by, cars going up and down the street." This relationship continued after appellant was incarcerated in Denver. Cowart also testified that she suffered from diabetes and as a result was losing her eyesight. She commented that appellant expressed concern over her medical condition in letters and conversation. The record is not clear on whether appellant's concern for Cowart's vision problems occurred before or after his incarceration. Nevertheless, the character and quality of this testimony is not remotely related to the kind of evidence that prompted a reversal in the *Penry* case. Appellant has attempted to posture the Cowart testimony as indicative of lifelong qualities that somehow entitle him to a *Penry* charge. We do not agree and see Cowart's testimony as nothing more than an appeal for "sympathy or emotion." See *California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring). Appellant also fails to point out that Cowart was asked about the disposition of appellant. Cowart testified:

"Q. Have you ever known him to be a violent individual?

"A. No, sir.

"Q. Have you ever observed him to have an uncontrollable temper?

"A. No. Any time I've been around him he's always been kind of a happy go lucky person. I've never seen him down. I've never seen him even slightly perturbed about anything."

Considering Cowart's testimony as a whole and disregarding the patent appeals to sympathy and emotion based on the witness' alleged disability, we hold that the jury had the opportunity to give effect to Cowart's testimony through special issue number two regarding future

dangerousness. See *Franklin*, 487 U.S. at 180, 108 S.Ct. at 2330.

[2] Cynthia Lee took the stand and related that she was a resident of Denver, Colorado who had known appellant for four or five years. Lee met appellant in a lounge after bumping into him. Lee testified that she had never dated appellant but they had gone on outings to the mountains. Appellant focuses on the portion of Lee's testimony that describes appellant's relationship with Karen Cracken. Lee described Cracken, a fourteen year old, as coming from a troubled background and as suffering from mental and physical problems. Lee stated that appellant's phone calls, letters, drawings and poetry gave Cracken a different perspective on life. What the brief for appellant does not point out is that appellant never met Cracken face to face and the relationship that is described took place within the time frame of ***773** appellant's incarceration. We have several thoughts on the value of Lee's testimony.

We consider appellant's focus on the physical and mental condition of "his friend" as nothing more than a transparent attempt to bring "sympathy" evidence under the purview of the Eighth Amendment for purposes of a *Penry* charge.

Even more damaging to appellant's assertion that Lee's testimony entitles him to a *Penry* charge is the testimony from Lee that appellant was a nonviolent person. On direct examination the following exchange occurred:

"Q. What type of personality does Miguel have? "A. Very pleasant and just real jolly. You know, he wants to

know what is going on around him.

"Q. Have you ever observed him to be a violent individual?

"A. Not at all. No.

"Q. Have you ever observed him to be mean or vicious towards other people?

"A. Never."

Lee's testimony, taken as a whole, goes directly to the question of future dangerousness and the jury had the opportunity to give mitigating effect to her testimony through special issue number two. See *Franklin*, 487 U.S. at 180, 108 S.Ct. at 2330.

ARTISTIC AND POETIC TALENT

[3] We next confront the evidence of appellant's artistic and poetic talent and its Eighth Amendment value in the context of *Penry*. The brief for appellant contends that the defense presented evidence of Richardson's "significant worth" to society as an artist and poet. Cynthia Lee, a friend of appellant, literally gushed forth with descriptions of appellant's talents. She stated when describing a picture he had drawn: "It was real intensifying." As to appellant's poetry Lee stated: "You can't pickup (sic) a book and read poetry that is as good as a lot of this. Some are short and some of them are three, four, five pages long. Some of them a lot longer than that. They are gorgeous."

Several other witnesses gave passing assessments of appellant's artistic and poetic ability. Paquita Richardson, appellant's sister, testified that appellant was a poet. Kabelitz,

appellant's boyhood minister, also offered his opinion as to the artistic abilities of the appellant. Kabelitz testified that appellant had artistic ability and on occasion would receive appellant's drawings which were of a religious nature. Cowart, also a friend of appellant, mentioned that she had received small drawings on the outside of envelopes and had read "some poetry" by appellant. Bernard, another minister, also testified that appellant could draw.

We reject appellant's contention that the testimony offered establishes appellant's "significant worth" as an artist or poet. *Penry*, at the least, *appears* to demand evidence demonstrating lifelong dedication to the arts or poetry in order to gain status as Eighth Amendment mitigating evidence. *Penry*, 492 U.S. at 324, 109 S.Ct. at 2950 (discussing severity of petitioner's afflictions). If we accept appellant's contention that this kind of evidence deserves a reversal based on *Penry* then *Penry* itself is nothing more than an automatic reversal rule and brings into question the facial validity of our capital murder sentencing scheme. *Penry* implicitly reaffirmed the facial constitutionality of the Texas death penalty statute. 492 U.S. at 317-318, 109 S.Ct. at 2946-2947 (Supreme Court noting that "the facial validity of the Texas death penalty statute had been upheld in *Jurek* on the basis of assurances that the special issues would be interpreted broadly enough ... [and that] Penry argues that those assurances were not fulfilled *in his particular case* ..." [emphasis in the original]).

Rather than attempt to shoehorn appellant's artistic and poetic abilities into the ambit of the second special issue, we choose to confront this issue directly and hold that the appellant's

ability to draw pictures and write poems in the context of this case has no mitigating value in the sense that it was relevant to the jury making a "reasoned moral response" in voting on the special issues nor do those abilities have any particular relevance to the appellant's moral culpability outside the special issues. In this particular case, we think that appellant's artistic talents ***774** do no more than strike an emotional chord that would cloud the jury's deliberations in reaching a decision. See *Saffle v. Parks*, 494 U.S. 484, 495, 110 S.Ct. 1257, 1264, 108 L.Ed.2d 415, 429 (1990). See also *California v. Brown*, 479 U.S. at 544, 107 S.Ct. at 841 (O'Connor, J., concurring).

CHILDHOOD ABUSE; MENTAL AND EMOTIONAL IMPAIRMENT

[4] Appellant asserts the testimony of Ms. Richardson, his sister, supports his contention that he came from an abused background. To the contrary, Ms. Richardson, a space shuttle payload specialist with Boeing Aircraft, testified as follows:
"Q. [by appellant's counsel] Let me ask you this. Was your father strict at home?
"A. Yes. He was.
"Q. Was he when Miguel was very young, was your father a very, very strict disciplinarian?
"A. He was strict to us, of course being a child we never liked getting whippings or being told what to do, however, he was understanding, but if he said something he meant it."

We disagree with appellant's characterization of this testimony as indicative of an abused background. Ms. Richardson's testimony does nothing more than indicate

appellant came from a normal background. Not one shred of her testimony mentions abuse, beatings, or other familial situations even remotely analogous to the mistreatment present in *Penry*.

Pastor Norb Kabelitz, a Lutheran minister from Oklahoma City, also testified about the general background and special talents of appellant. Appellant points to selected portions of the record which if taken out of context could lead one to believe that appellant suffered a variety of abuses worthy of a *Penry* charge. Close scrutiny of the record reveals otherwise.

Kabelitz testified as follows:

> "Q. Pastor, let me ask you this. In the earlier days was Miguel a well behaved child?
> "A. As normally well behaved as any of my others. Yes. Part of the youth group, the support group of the church. He played a role an acolyte in the church, communion. Sometimes not wanting to go to church like some kids do, et cetera, but he was there.
> "Q. Was his father a strict disciplinarian?
> "A. Yes.
> "Q. Did you have occasion to visit in the home?
> "A. Yes, often.
> "Q. Okay.
> "A. They meant the best for their children. The family from which Miguel comes is a well put together family, very strong father image. A mother who tried to do the best for their children. Middle class you might call them, hard working. He's at Tinker Air Force Base. The mother

> a homemaker and now working for a National Transportation Company...."

This testimony does not indicate that appellant received anything other than a middle class upbringing. At this point we reject any claim that Kabelitz' testimony brings appellant within the scope of *Penry* based on childhood abuse.

[5] Kabelitz also offered testimony concerning the racial strife that occurred in Oklahoma City in the 1960's and the apparent effect on appellant. Kabelitz implied that the social turmoil of that period stunted the appellant's educational development. He also testified that appellant's teachers "put him down publicly in class, called [him] names and [used] innuendos." Richardson has also pointed to the testimony of Lillie Rex and her references to racial problems in Oklahoma City as supportive of this point. We do not believe that Kabelitz' or Rex' testimony about societal conditions in the 1960's and the name calling allegations have any significance to the appellant's moral culpability beyond the special issues or any relevance to the first two special issues. *Franklin*, 487 U.S. at 180, 108 S.Ct. at 2330.

***775** Appellant has also attempted to establish a connection between his alleged abusive background and purported mental and emotional impairment as an adult. Appellant's multiple references to the record regarding Bearden, Seiver, Franklin, Laursen, Dunow, and the State's closing argument fail to establish any connection between alleged childhood abuse and its subsequent effect on appellant. There is simply no *Penry* evidence presented by the appellant's nexus argument.

This Court will not engage in analysis of a theory that is illogical on its face and not supported by the record.

[6] Appellant has also attempted to characterize the testimony of Robert Rast, a clinical psychologist, as indicative of Richardson's mental illness that had its roots in his childhood. Rast, however, was presented with a hypothetical based on the facts of the instant case and asked his opinion as to future dangerousness. Rast testified that in his opinion on direct and cross examination that the hypothetical "personality" in this case would be likely to commit future acts of violence. In closing argument on punishment, defense counsel again emphasized Rast's testimony for its potential value in the jury's deciding the question of future dangerousness. Counsel stated:

> "All right. You had an opportunity to hear and listen to a 'mental health professional' this morning, Doctor Rast. I assume that's what you will base your verdict on as to probability of future conduct."

Defense counsel's cross examination of Rast never established any connection between the diagnosis of sociopath and childhood experiences of Richardson. Rast's testimony went directly to the question of future dangerousness that could be properly considered under special issue number two.

[7] Appellant also asserts that Kabelitz' testimony of appellant's reading problems puts him on equal footing with *Penry*. We reject appellant's argument. Difficulty with learning to read, in and of itself, cannot establish a *Penry* claim. Penry was diagnosed as mentally retarded, in and out

of state schools, and never finished the first grade. *Penry*, 492 U.S. at 307, 109 S.Ct. at 2941. Appellant, on the other hand, did not suffer from the plethora of problems that *Penry* did. Difficulty with reading in the context of appellant's case does not reach the threshold that mandates a *Penry* instruction.

RELIGIOUS DEVOTION

[8] Several ministers other than Kabelitz testified as to the religious devotion of appellant. Doctor Griswold, a lay minister, had occasion to visit appellant during his incarceration in Denver. Griswold testified that appellant "came to a deep understanding of what the christian life is about."

Herbert Holston, minister and educator, also testified that appellant had made attempts to bring other persons to Christ. The record reflects that appellant's evangelical zeal took place while incarcerated in San Antonio.

Wayne Bernard, minister of the Randolph Church of Christ in Universal City, testified that appellant had studied the word of God for seven months. Bernard noted that he had seen a "real conversion within Miguel, and I think that is evidenced by the fact that I have never seen any acts of violence, verbal or physical from him in the seven months I have known him." Again, appellant's conversion took place during his incarceration in San Antonio.

Ralph Vickery, a deputy sheriff, testified that Richardson had a cross forcibly removed from around his neck. Appellant argues the forced removal is evidence of religious devotion;

however, Vickery testified the cross was removed because of a general rule against allowing prisoners to wear necklaces in certain jail areas. Appellant has also offered the testimony of Lillie Rex his childhood Sunday School teacher. Rex stated that Richardson was faithful about coming to Sunday school.

The evidence of appellant's religious devotion is *Franklin* evidence and could be properly addressed by a jury answering issue number two. Appellant's jail house conversions demonstrate nothing more than his ability to adapt to a structured prison environment. We also note that the childhood minister of appellant, Pastor Kabelitz, did not testify about any significant religious devotion, ***776** of the character and quality, that would entitle appellant to a *Penry* instruction. The jury had ample opportunity to give effect to any mitigating value of appellant's religious zeal when they deliberated on the issue of future dangerousness. See *Franklin*, 487 U.S. at 180, 108 S.Ct. at 2329-30.

The judgment is affirmed.

CAMPBELL, J., concurs in the result.

BAIRD, J., dissents.

WHITE, J., not participating.

BENAVIDES, Judge, concurring.

I am unable to join the Court's opinion, but concur in its judgment. This case comes to us on remand from the United States Supreme Court so that we might reconsider our earlier

disposition of it in light of *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Accordingly, we once again decide whether, under the Eighth Amendment, appellant was entitled to have his jury determine the mitigating significance, beyond that contemplated by the special punishment issues, of certain evidence proffered by him as a reason for imposition of a sentence less than death. This evidence was of several different kinds, and has been grouped for purposes of analysis into the following categories: (1) voluntary service and kindness to others; (2) religious devotion; (3) artistic and poetic talent; (4) family ties; and (5) childhood abuse, together with mental and emotional impairment.

As I perceive it, the central basis for the Supreme Court's opinion in *Penry* was that mitigating circumstances relevant to punishment within the meaning of the Eighth Amendment are those circumstances of "the defendant's background and character [which will support a] belief, long held by this society, that defendants who commit criminal acts that are attributable to [such circumstances] may be less culpable than defendants who have no such excuse." 492 U.S. at 319, 109 S.Ct. at 2947, 106 L.Ed.2d at 278, quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (concurring opinion of O'Connor, J.). In my view, none of the evidence in the first four categories suggested by appellant meets this criterion, for it seems reasonably clear to me that persons with a history of selflessness or community service, religious or family allegiance, and artistic, scientific or literary talent, are not thought less blameworthy for their criminal conduct by any significant segment of our society.

See Lewis v. State, 815 S.W.2d 560 (Tex.Cr.App.1991). Rather, if society does regard such characteristics as mitigating, it must necessarily be because persons possessing them are thought to be more valuable than are those who do not, or somehow deserving of greater consideration on account of their important contributions. Whatever other social or political interest such a belief may serve, personal moral culpability plainly has nothing to do with this sense of mitigation.

Of course, it might be noticed that "dangerousness" is also irrelevant to culpability, even though a low probability of it has been held to have significant mitigating effect as a matter of constitutional law. *See* Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Restricting one's understanding of "mitigation" only to that evidence which affects culpability would, therefore, draw the constitutional net too tightly. But, to the extent that evidence has a tendency to prove an accused less dangerous than other offenders, the jury is given full authority under Texas statutory law to express its judgment by answering the second special punishment issue negatively. *See* Art. 37.071(b)(2), V.A.C.C.P.

Unquestionably, further careful reading of constitutional precedent in this context also seems to imply that "culpability" and "dangerousness" are not the only mitigation criteria required by the Eighth Amendment. *See* Franklin v. Lynaugh, 487 U.S. 164, 186, 108 S.Ct. 2320, 2332-2333, 101 L.Ed.2d 155 (1988) (O'Connor, J., concurring). Certainly, I have no reason to suppose that the Supreme Court has come

to the end of its mitigation exegesis. But neither have I any clear picture of the direction that exegesis is likely to take in the future. In my judgment, the Supreme Court has not yet provided a constitutional theory of mitigation sufficiently general in scope to enable application of it to ***777** evidence which does not bear specifically on issues of culpability or dangerousness. Accordingly, it seems prudent under circumstances as they presently exist for this Court fully to effectuate the doctrine's current scope without extending it to regions as yet unexplored by the Constitution's highest court.

I do not mean by this that only evidence identical to that raised by Penry himself is within the ambit of existing constitutional law. As pointed out in *Gribble v. State*, 808 S.W.2d 65, 75 (Tex.Cr.App.1990), we accept the fact that, whenever a capital defendant produces evidence of his own character, background, or the circumstances surrounding his offense which, according to contemporary social standards, has a tendency to reduce his moral culpability in a way not exclusively related to the deliberateness of his criminal conduct, the provocative behavior of his victim, or the probability of his future dangerousness, the United States Constitution forbids imposition of the death penalty upon him by a sentencer given no means to prescribe, based on such mitigating evidence, a less severe punishment.

Clearly, mental retardation and childhood abuse are not the only circumstances which meet this test. But the test itself is the only one I would apply in Texas until further constitutional interpretation makes its modification necessary.

For this reason, the last category of evidence suggested by appellant seems to me the only plausible candidate for a claim that his personal moral culpability was at issue in a way not contemplated by the statutory punishment questions. When a child has been abused by his parents or by some other person in a position of trust or obligation toward him, he may have a greater tendency than normally reared children to develop an impaired conscience. In my experience, society does have an inclination to regard such persons as less blameworthy when, as adults, they offend social norms and standards. It also seems that society is willing to take this position irrespective of the probability that such offenders will continue, for the same reasons, deliberately to commit criminal acts of violence in the future.

Had appellant produced sufficient evidence to raise the issue that his conscience was impaired because he was abused or betrayed as a child, and might therefore be somewhat less culpable for his criminal behavior as an adult, I would be inclined to hold that he could not be put to death consistently with prohibitions of the Eighth Amendment absent a jury instruction of the kind requested, or its functional equivalent. But, in spite of his protestations on appeal, appellant produced no such evidence at trial. I discern in the appellate record no implication that he was treated in any manner that could fairly be characterized as cruel, deceitful, or contemptuous. Instead, what he identifies in his brief as proof of abuse is really nothing more than evidence of a strictly rule-governed upbringing. Because I am unaware of any conspicuous belief among the American people that such an upbringing mitigates moral responsibility for mature misconduct, I cannot conclude

that appellant's death sentence is offensive to the Eighth Amendment within the meaning of *Penry v. Lynaugh.*

I, therefore, concur in the judgment of the Court.

CLINTON, Judge, dissenting.

The majority opinion demonstrates two fundamental misunderstandings of the very case that prompted the Supreme Court of the United States summarily to remand this cause for our reconsideration, *viz:* *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Because of its crabbed interpretation of *Penry,* the majority has yet to satisfy this mandate.

First, I fear the majority has not assimilated the basic holding in *Penry* that a capital jury must be empowered to effectuate any evidence that has mitigating potential that cannot be *fully* accommodated within the jury's response to special issues under Article 37.071(b), V.A.C.C.P. Early on the majority describes the Supreme Court's holding to be that proof of mental retardation and child abuse "constituted mitigating evidence that either was not relevant to the Texas special verdict issues or that had relevance to ***778** the defendant's moral culpability beyond the scope of the special verdict questions." At 774. So far, so good. However, in coming to address the question whether the evidence proffered in mitigation in this cause necessitated the giving of one or more of his requested instructions, the majority tacitly assumes throughout that as long as it can identify some sense in which that evidence might be said to militate in favor of a "no" answer to one of the special issues, then it is not confronted

with what it calls "*Penry* evidence." This assumption misses the very essence of the Supreme Court's holding. It may well be that the jury "had the opportunity to give effect" to a particular item of mitigating evidence within the parameters of special issues. E.g., at 775, 776 & 778. [FN1] But should that evidence also have some potentially mitigating aspect not accountable under the special issues, we cannot say that special issues enable the jury to give it *full* consideration and effect. The jury must be empowered to give mitigating evidence all the effect to which it is susceptible before we can say the Eighth Amendment has been satisfied, consonant with the holding in *Penry*. [FN2] To the extent it suggests otherwise, the majority opinion errs.

FN1. Telling in this context is the treatment of appellant's claim that evidence of his "artistic and poetic abilities" entitled him to the requested instruction. "Rather than to attempt to shoehorn" these "into the ambit of the second special issue," the majority simply announces these qualities of character have no mitigating significance whatsoever, either within the scope of special issues or otherwise. Slip. op. at 6. Again, this approach tacitly assumes that had the majority been able thus to "shoehorn" the proffered evidence, the analysis would end. The majority apparently continues to subscribe to the view that as long as some mitigating effect can be given within the special issues, the Eighth Amendment is satisfied. Distilled to its essence, this is precisely the view the Supreme Court put to rest in *Penry*.

> FN2. Of course I do not mean to intimate that a jury must assess a penalty less than death in any case in which mitigating evidence going beyond the scope of special issues is presented. But where such evidence is presented jurors must not be precluded from assessing a penalty less than death by omission of a requested instruction that would empower them to do so.

Secondly, as I understand it, the majority categorically rejects the view that evidence of appellant's voluntary service and kindness to others, his artistic and poetic talent, and his religious devotion can have any mitigating potential beyond the scope of special issues. [FN3] By and large, the majority believes such evidence evokes only a "sympathetic" or "emotional" response, not a "reasoned moral response." It is evident to me that a majority of the United States Supreme Court would disagree.

> FN3. I agree with the majority that appellant's evidence he claims establishes a history of family abuse cannot reasonably be construed to do so. On the other hand, evidence that he was "put down" as one of a handful of black students in a predominantly white school, the admittedly nebulous testimony of the effect of the general racial turbulence during his school days, and evidence of a reading disability, all tend, at least, to show "a disadvantaged background," and to show appellant might certainly have cause for "emotional problems." *Penry v. Lynaugh*, 492 U.S. at 318- 319, 109 S.Ct. at 2947, 106 L.Ed.2d at 278, quoting *California v. Brown*, 479 U.S. 538, at 545,

> 107 S.Ct. 837, at 841, 93 L.Ed.2d 934, at 942 (1987) (O'Connor, J., concurring). The majority concludes, *ipse dixit,* that evidence of name-calling and the effect of racial unrest has no bearing on his moral culpability. Similarly, the majority opines that evidence of a reading disability "does not reach the threshold that mandates a *Penry* instruction." Until the majority identifies where that "threshold" lies, however, such pronouncements carry more rhetorical than authoritative weight.

The Supreme Court has told us that "the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence." *McCleskey v. Kemp,* 481 U.S. 279, at 304, 107 S.Ct. 1756, at 1773, 95 L.Ed.2d 262, at 286 (1987). [FN4] "[A]ny aspect of a defendant's character or record and any of the circumstances of the offense" that in reason could persuade a jury to impose a penalty less than death may be said in this context to be "relevant" mitigating evidence. [FN5] ***779***Lockett v. Ohio,* 438 U.S. 586, at 604, 98 S.Ct. 2954, at 2965, 57 L.Ed.2d 973, at 990 (1978) (Plurality opinion); *Eddings v. Oklahoma,* 455 U.S. 104, at 110, 102 S.Ct. 869, at 874, 71 L.Ed.2d 1, at 8 (1982).

> FN4. Emphasis here and throughout is in the original.

> FN5. In truth, the concept of "relevancy" in this context seems odd to me. The only material issue, or "fact of consequence," is whether an accused found guilty of a capital crime deserves a sentence less than

> death. As is the case at the punishment phase of a non-capital prosecution, where the issue is simply "what punishment to assess," this is "a normative process, not intrinsically fact bound." *Murphy v. State*, 777 S.W.2d 44, at 63 (Tex.Cr.App.1989) (Plurality opinion on State's motion for rehearing). That being the case, it seems to me that "what is 'relevant' to determining proper punishment is more a question of policy than of logic." *Id.* Because it is a question of Eighth Amendment proportions, however, that policy call is ultimately for the United States Supreme Court to make.
>
> "Lockett and Eddings reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion."

California v. Brown, 479 U.S. 538, at 545, 107 S.Ct. 837, at 841, 93 L.Ed.2d 934, at 942 (1987) (O'Connor, J., concurring). Evidence invoking a purely sympathetic or emotional response is probably not "relevant." See *Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990).

The majority describes evidence of appellant's relationship with Karen Cracken as nothing more than a "transparent" ploy for sympathy. It rejects outright any possibility that evidence of his artistic sensibilities could be a legitimate component of a jury's reasoned moral judgment whether to impose the death

penalty. Nor does the majority itself "believe" his evidence of racial strife during his school years can inform that decision. [FN6] Finally, the majority opines that religious devotion is a consideration that is covered under the second special issue; apparently the majority believes it either has no other mitigating value, or need have no other mitigating value so long as the jury can give it some, albeit not *full,* mitigating effect.

FN6. See n. 3, *ante.*

Evidence precisely of this kind is not squarely covered in *Penry v. Lynaugh,* supra. Nevertheless, it is not plain to me that jurors would find these facets of appellant's character insignificant in making the normative evaluation whether he deserves to live in spite of his crime. The Supreme Court has not expressly limited its view of "relevant" mitigating evidence to those circumstances necessarily bearing on personal culpability for the particular offense committed or those aspects of the defendant's background or makeup to which his crime may be, at least in part, attributable. [FN7] See *Skipper v. South Carolina,* 476 U.S. 1, at 4-5, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1, 7 (1986). To the contrary, there is every indication a majority of the Supreme Court believes "[e]vidence of voluntary service, kindness to others, or of religious devotion" to be relevant inasmuch as it "might demonstrate positive character traits that might mitigate against the death penalty." *Franklin v. Lynaugh,* 487 U.S. 164, at 186, 108 S.Ct. 2320, at 2333, 101 L.Ed.2d 155, at 173 (1988) (O'Connor, J., concurring). When the Supreme Court

defines evidence as "relevant" for Eighth Amendment purposes, this Court is not at liberty to regard it otherwise.

> FN7. Certainly the probability--or, for that matter, the improbability--that a capital defendant would commit future acts of violence that would constitute a continuing threat to society is not a question bearing on his personal culpability for the particular offense on trial. Yet we know that our second special issue provides at least a partial mechanism for jury consideration of what is, in contemplation of the Supreme Court, relevant "mitigating" evidence under the Eighth Amendment. *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988).

Today's majority continues to resist the holdings in *Lockett*, *Eddings*, *Skipper*, and now *Penry v. Lynaugh*, supra, foxhole by foxhole, to the last bunker. See *Stewart v. State*, 686 S.W.2d 118 (Tex.Cr.App.1984) (Clinton, J., dissenting). Declining to join the latest skirmish, I respectfully dissent.

MALONEY, J., joins.

END OF DOCUMENT

113 S.Ct. 3026 (Mem)
125 L.Ed.2d 715, 61 USLW 3867
(Cite as: 509 U.S. 917, 113 S.Ct. 3026)

Supreme Court of the United States

Miguel A. RICHARDSON, petitioner,
v.
TEXAS.

No. 91-6745.

June 28, 1993.

Former decision, 492 U.S. 914, 109 S.Ct. 3235.

Case below, 744 S.W.2d 65; 886 S.W.2d 769.

On petition for writ of certiorari to the Court of Criminal Appeals of Texas. The motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Criminal Appeals of Texas for further consideration in light of *Johnson v. Texas*, 509 U.S. 350, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993).

END OF DOCUMENT

109 S.Ct. 3235 (Mem)
106 L.Ed.2d 583
(Cite as: 492 U.S. 914, 109 S.Ct. 3235)

Supreme Court of the United States

Miguel A. RICHARDSON, petitioner,
v.
TEXAS

No. 87-6482

July 3, 1989

Case below, 744 S.W.2d 65.

On petition for writ of certiorari to the Court of Criminal Appeals of Texas. The ***914** motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Court of Criminal Appeals of Texas for further consideration in light of *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).

END OF DOCUMENT

Court of Criminal Appeals of Texas,
En Banc.

Miguel A. RICHARDSON, Appellant,
v.
The STATE of Texas, Appellee.

No. 68934.

Oct. 28, 1987.

Defendant was convicted in the 175th Judicial District Court, Bexar County, Preston H. Dial, Jr., J., of capital murder and he appealed. The Court of Criminal Appeals held that: (1) trial court's error in sua sponte excluding juror without proper predicate was harmless where State had remaining peremptory challenges; (2) trial court's instructions on capital murder were adequate; (3) defendant was not improperly denied of opportunity to obtain depositions of witnesses in Mexico; (4) defendant was properly precluded from cross-examining witness as to details of prior felony; and (5) defendant did not establish common-law marriage with one witness who testified against him.

Affirmed.

Clinton, J., dissented and filed an opinion in which Teague and Duncan, JJ., joined.

West Headnotes

[1] Criminal Law 1035(6)
110k1035(6)

Defendant's objection to trial court's sua sponte exclusion of juror for cause which called attention to the fact that there was a portion of the statute which the judge appeared to be ignoring in determining that his action was correct was adequate to preserve for appeal claim that court should not have excused the juror without further questioning. Vernon's Ann.Texas C.C.P. art. 35.16(a), par. 10.

[2] Jury 133
230k133

Absent questioning of prospective juror as to whether the conclusion he had reached as to defendant's guilt would influence his action in finding a verdict, predicate for excusal had not been laid and it was error for trial judge to excuse juror over defense objection. Vernon's Ann.Texas C.C.P. art. 35.16(a), par. 10.

[3] Criminal Law 1166.16
110k1166.16

When trial judge erroneously excuses prospective juror over objection of defense counsel, general rule is that it is not error requiring reversal unless there is a showing that defendant was harmed by the trial court's action.

[4] Criminal Law 1166.16
110k1166.16

In noncapital cases, when State does not use all of its strikes in the jury selection process, harm from erroneous exclusion of juror for cause over defendant's objection is not shown as State could peremptorily strike the juror at the conclusion of voir dire but, in capital cases, it is immaterial that the State had strikes remaining at the end of voir dire because the sustaining of a challenge for cause over defense objection during individual voir dire has the immediate effect of giving the State an additional peremptory strike.

[5] Criminal Law 1166.16
110k1166.16

Existence of unused peremptory strikes at conclusion of jury selection process in capital case rendered improper exclusion of venireman over defendant's objection harmless where the court excused the venireman sua sponte rather than as the result of a challenge for cause by the State.

[6] Criminal Law 1043(3)
110k1043(3)

Defendant who did not object at trial to sua sponte nature of trial court's action in excusing juror, and merely argued that exclusion of the juror was not proper, did not preserve for review contention that it was error to excuse the juror sua sponte.

[7] Witnesses 52(1)
410k52(1)

Where alleged marriage occurred in Oklahoma, claim that there had been a valid marriage, and thus that introduction of witness' testimony violated marital privilege, would be tested according to the substantive laws of Oklahoma.

[8] Witnesses 52(1)
410k52(1)

When considering procedural rules applicable to claim of marital privilege, court would refer to the law of the forum regardless of where the asserted marriage took place.

[9] Marriage 50(1)
253k50(1)

Burden is on proponent of common-law marriage to prove the marriage by clear and convincing evidence in Oklahoma and by preponderance of the evidence in Texas.

[10] Witnesses 78
410k78

Defendant did not show valid marriage to prosecution witness, so as to preclude her testimony against him, in view of fact that defendant claimed that he had represented a number of women as his wife over the years and evidence that he never represented the witness as his wife.

[11] Marriage 13
253k13

Claim of common-law marriage by defendant who seeks to preclude witness' testimony must be closely scrutinized, and agreement of marriage should be specific on both sides.

[12] Witnesses 199(1)
410k199(1)

Attorney-client privilege does not include communications between defendant and fellow inmate who takes it upon himself to give legal advice to defendant.

[13] Criminal Law 629(3.1)
110k629(3.1)
(Formerly 110k629(3), 110k629)

Names of witnesses should be disclosed, upon proper motion by defendant, if they will be used by the State at any stage in the trial.

[14] Criminal Law 1115(1)
110k1115(1)

Standard of review when witness is permitted to testify who was not included on the witness list is whether the trial court abused its discretion in permitting the witness to testify.

[15] Criminal Law 1166(11)
110k1166(11)

Reversal was not required when trial court permitted witness who had not been on State's lists of witnesses to testify at punishment stage where the witness, a psychologist, was not particularly biased towards one side or the other, and defendant did not show in what way the substitution of the witness for other witnesses regarding hypothetical questions concerning defendant's likelihood of committing future acts of violence restricted defendant's ability to cross-examine the witness.

[16] Witnesses 350
410k350

Defendant who was able to fully explore possible prejudices and biases of witness by showing prior offenses was properly precluded from cross-examining the witness concerning the details of the offenses.

[17] Witnesses 344(2)
410k344(2)

Evidence of offenses committed by parties other than the defendant is inadmissible.

[18] Criminal Law 382
110k382

If evidence proffered by defendant is neither inconsistent with nor precludes his guilt, evidence is not proof of any material issue and is properly excluded.

[19] Criminal Law 598(3)
110k598(3)

It was not error to deny defendant's motion for continuance to obtain depositions from witnesses in Mexico where counsel was appointed on March 10 and informed on May 29 that trial was to begin on August 31, and yet made no motion to obtain the depositions until July 29.

[20] Criminal Law 641.12(3)
110k641.12(3)

[20] Witnesses 2(1)
410k2(1)

Defendant was not deprived of effective assistance of counsel and compulsory process by trial court's alleged denial of sufficient time and funds for court reporter and interpreter to go to Mexico City to obtain depositions of witnesses.

[21] Attorney and Client 132
45k132

Counsel is entitled to reimbursement from State for investigative expenses incurred on behalf of indigent

defendant only after they are incurred. Vernon's Ann.Texas C.C.P. art. 26.05.

[22] Homicide 354(1)
203k354(1)
(Formerly 203k354)

Defendant's failure to object to testimony of witness that he had supervised defendant after his release on parole waived any error as to introduction of federal judgment and commitment during punishment phase of capital murder trial.

[23] Homicide 18(5)
203k18(5)

Capital murder based on the intentional commission of murder in the course of committing robbery is committed when a person intentionally and knowingly causes the death of an individual and intentionally commits the murder in the course of committing or attempting to commit robbery. V.T.C.A., Penal Code § 19.03(a)(2).

[24] Criminal Law 772(1)
110k772(1)

[24] Indictment and Information 60
210k60

Indictment must set forth the offense in plain and intelligible words and instruction to the jury generally must correspond to the allegations in the indictment. Vernon's Ann.Texas C.C.P. arts. 21.02, 21.11.

[25] Homicide ⚿138
203k138

Trial court's instructions which followed language of indictment charging defendant with capital murder committed in the course of committing or attempting to commit a robbery clearly indicated that defendant was being charged with capital murder on the basis of committing the robbery and not with felony-murder. V.T.C.A., Penal Code §§ 19.02(a)(3), 19.03(a)(2).

[26] Homicide ⚿289
203k289

Trial court's instruction which properly required that jury find that defendant intentionally caused death while in the course of committing or attempting to commit robbery properly tracked the indictment and did not permit jury to convict defendant upon a finding of a culpable mental state less than that required by statute. V.T.C.A., Penal Code § 19.03(a)(2).

[27] Criminal Law ⚿1169.1(8)
110k1169.1(8)

Admission of items found during allegedly illegal search was cumulative to testimony of other witnesses and thus was harmless beyond a reasonable doubt.

***67** Allen Cazier (Court-appointed), San Antonio, for appellant.

Fred G. Rodriguez, Dist. Atty. & Keith Burris, Steve Hilbig, James L. Bruner & Daniel Thornberry, Asst. Dist. Attys., San Antonio, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

PER CURIAM.

Appellant was convicted of capital murder. The special issues required under Article 37.071(b), V.A.C.C.P., were submitted to the jury and were answered in the affirmative. Punishment was assessed at death. Having reviewed appellant's twelve grounds of error, we affirm. [FN1]

> FN1. We will use the term "ground of error," because it was proper when appellant's appeal was filed and was used by appellant in his brief.

We will first consider appellant's eleventh ground of error, in which he makes his sole complaint regarding voir dire examination. He complains of the improper excusal of prospective juror William Noble. Earlier during the examination of Noble, the trial court overruled the State's challenge for cause on *Witherspoon* grounds. [FN2] Later, however, Noble was excused *sua sponte* by the trial judge after Noble stated that he had already formed an opinion as to guilt or innocence. As stated in appellant's brief: "Defense counsel objected on the basis that Mr. Noble was being excused by the court without the full predicate for his excuse [sic] having been laid. The court replied that when a

prospective juror states that he has already formed an opinion as to the guilt or the innocence of the defendant there should be no further questioning. Defense counsel then pointed out that an additional sentence is contained in the article in question." The entire exchange is herein set out:

> FN2. Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

"[NOBLE:] You used a couple of words there, bias and impartial that I think you might want to pursue.
"[DISTRICT ATTORNEY:] Well, are you biased in some manner about this case?
***68** "[NOBLE:] Well, I have read quite a bit about it. And I feel that I have already prejudged the case. I mean I take all the newspapers. I'm a journalist by profession and I know--I don't disregard what I see in the paper.
"THE COURT: Have you already formed an opinion as to the guilt or innocence?
"[NOBLE:] Yes, Your Honor. I think it's only fair that I say that I have formed an opinion.
"THE COURT: You will be excused Mr. Noble. You can return to the Central Jury Room. They will discharge you from there.

* * *

"[APPELLANT'S ATTORNEY:] If the Court please, the Defendant objects to Mr. Noble being excused, the entire predicate not having been laid for his excuse.
"THE COURT: You are excused.

* * *

"THE COURT: The statute provides if the juror states from hearsay or otherwise he has already formed an opinion as to the guilt or innocence of the Defendant there will be no further questioning.
"[APPELLANT'S ATTORNEY:] Does it say one more sentence?
"THE COURT: [Ignoring the last remark of appellant's attorney] Can you do one [another juror] in ten minutes?
"[DISTRICT ATTORNEY:] No sir.
"[APPELLANT'S ATTORNEY:] I would say that we--
"THE COURT: Mr. Williams [District Attorney] says no. I'll accept that. Let's recess until 1:30, gentlemen."
[Lunch Recess Declared]

The statute referred to, Art. 35.16(a)(10), V.A.C.C.P., provides in pertinent part that a challenge for cause may be made for the following reason:
"That from hearsay, or otherwise, there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as would influence him in his action in finding a verdict. To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in his opinion, the conclusion so established will influence his verdict. If he answers in the affirmative, he shall be discharged without further interrogation by either party or the court. If he answers in the negative, he shall be further examined...."

[1][2] Contrary to the State's argument in its brief on appeal, we find the objection of appellant's counsel, although not a model in specificity, was sufficient to preserve his complaint on appeal that an Art. 35.16(a)(10) challenge for cause requires more than that the juror express that he has established a conclusion as to a defendant's guilt or innocence. It is readily apparent that appellant's counsel was attempting to alert the trial judge that Noble needed to be asked whether, in his opinion, the conclusion would influence him in his action in finding a verdict. Absent this question, made mandatory by the statute, the predicate for excusal had not been laid. Indeed, even if the question had been asked and answered, the predicate for excusal would only be complete if the reply were yes. A negative reply calls for further specific questioning about the extent to which the conclusion will affect his action, followed by a discretionary decision by the trial judge concerning the venireman's impartiality.

It is clear then that the predicate for excusal under Art. 35.16(a)(10) had not been laid and that the objection of appellant's attorney specifically directed the trial court's attention to the missing portion of the predicate. The overruling of said objection constituted error. It remains to be seen whether such error requires reversal.

[3][4] When a trial judge erroneously excuses a prospective juror over the objection of defense counsel, the general rule is that this is not error requiring reversal unless there is a showing that appellant was harmed by the trial court's action. Culley v. State, 505 S.W.2d 567 (Tex.Cr.App.1974); *69Henriksen v. State, 500 S.W.2d 491 (Tex.Cr.App.1973);

Weaver v. State, 476 S.W.2d 326 (Tex.Cr.App.1972). In Payton v. State, 572 S.W.2d 677, 680 (Tex.Cr.App.1978), this Court held that "[h]arm may be shown in the erroneous exclusion of a qualified juror by showing the State exhausted its peremptory challenges." If the State has exhausted all of its peremptory challenges, the trial court's action, "from the perspective of the defendant, [was] the same as if the State had been given an extra peremptory challenge." Payton, supra at 680; Martinez v. State, 621 S.W.2d 797 (Tex.Cr.App.1981). When the State does not use all of its strikes in the jury selection process, however, harm is not shown because had the judge refused the challenge for cause the State could have (and most assuredly would have) peremptorily struck the person from the jury at the conclusion of the voir dire. Thus, by reserving an unused peremptory challenge the State is permitted a constructive use against the erroneously excluded venire member. Payton, supra; Culley, supra; Weaver, supra.

In capital cases, however, it is ordinarily immaterial that the State had strikes remaining at the end of the voir dire examination. If the trial court erroneously sustains a State's challenge for cause over defense objection during individual voir dire in a capital case, this has the immediate effect of giving the State an additional peremptory strike. Grijalva v. State, 614 S.W.2d 420 (Tex.Cr.App.1981). As stated in Grijalva, supra at 424:

"The manner of exercising peremptory challenges is explicitly differentiated in Arts. 35.13 and 35.25, V.A.C.C.P. The procedure followed in Chambers [v. State, 568 S.W.2d 313 (Tex.Cr.App.1978)] and this case is stated in Art. 35.13,

supra:
'A juror in a capital case in which the state has made it known it will seek the death penalty, held to be qualified, shall be passed for acceptance or challenge first to the state and then to the defendant. Challenges to jurors are either peremptory or for cause.'
"On the other hand, in non-capital cases, such as those upon which *Chambers* relied, the procedure is quite different, as provided in Art. 35.25, supra:
" 'In non-capital cases and in capital cases in which the State's attorney has announced that he will not qualify the jury for, or seek the death penalty, the party desiring to challenge any juror peremptorily shall strike the name of such juror from the list furnished him by the clerk.'"

To allow the State to render harmless the improper challenge for cause and excusal of a venire member by the simple expedient of not using all of the State's peremptory challenges would be, as stated in Grijalva, supra at 424- 425:
"... corruption of the peremptory strike practice that violates the terms of Art. 35.13, supra, and gives an unfair advantage to the State in the jury selection process.
First, to allow the State to exercise its peremptory challenges in a capital case after conclusion of the voir dire examination gives it the benefit of making its judgments with a perspective of the entire panel, a perspective that is not given the defendant.
Second, giving such a privilege to the State allows it to withhold its strikes until after the defendant has exercised his strikes, even though Art. 35.13, supra, explicitly states that the qualified venireman shall be passed first to the state and

then to the defendant. The statute would give the benefit to the defendant in instances where both sides might desire to strike the same venireman. Allowing the State to wait until the end of the selection process would transfer that benefit to the State.

Third, to allow retrospective exercise of peremptory challenges *on appeal* gives the State even greater advantages. When used on appeal the State effectively postpones exercise of its strikes until error has been found, and then with the benefit of the ruling of this Court as its guide the State can maximize the accuracy of the strikes not used at trial. In actuality this Court not only counsels the State, but actually exercises the strike ***70** for the State. In effect a peremptory strike against a prospective juror is transformed into a peremptory strike against a ground of error." (Emphasis in original) [FN3]

> FN3. Although the venire member in Grijalva, supra, was erroneously excluded on Witherspoon, supra, grounds, the rationale of *Grijalva* clearly applies to all challenges for cause in death penalty cases since this Court specifically held that the decision was based on State law grounds and was not limited to *Witherspoon* error. Grijalva, supra at 425.

In Bell v. State, 724 S.W.2d 780 (Tex.Cr.App.1986), we set forth the rules relative to jury selection and its review, and stated, id. at 795:

"Before addressing appellant's specific contention, we will make a brief recitation of the rules regarding jury selection and the harm a defendant must show in order to merit

reversal. If a trial court erroneously overrules a defendant's challenge for cause, the defendant may establish harm by showing: (1) exhaustion of his peremptory challenges; (2) denial of a request for additional peremptory challenges; and (3) the seating of a juror upon whom the defendant would have exercised a peremptory challenge. East v. State, 702 S.W.2d 606 (Tex.Cr.App.1985); White v. State, 629 S.W.2d 701 (Tex.Cr.App.1981), *cert. denied,* 456 U.S. 938, 102 S.Ct. 1995, 72 L.Ed.2d 457 (1982); Hernandez v. State, 563 S.W.2d 947 (Tex.Cr.App.1978); Payton, supra. In non-capital murder cases, if the trial court erroneously grants a State's challenge for cause and excludes a qualified juror, the defendant may establish harm simply by showing that the State exhausted all of its peremptory challenges. In such a case the court has effectively given the State the benefit of an additional peremptory challenge. Payton, supra. See also Culley v. State, 505 S.W.2d 567 (Tex.Cr.App.1974); and Weaver v. State, 476 S.W.2d 326 (Tex.Cr.App.1972). In capital murder cases, if the trial court improperly sustains a State's challenge for cause and excludes a qualified juror, over a defendant's objection, reversible error arises regardless of whether the State has exhausted its peremptory challenges. This is because peremptory strikes are exercised after each prospective juror is questioned, under Art. 35.13, V.A.C.C.P., as opposed to after the entire panel is questioned in a non-capital case. Grijalva v. State, 614 S.W.2d 420 (Tex.Cr.App.1981). See also Turner v. State, 635 S.W.2d 734 (Tex.Cr.App.1983)."

We then observed that the rules are different when a trial court excuses a prospective juror *sua sponte:*

"When the trial court *sua sponte* excludes a *qualified* juror, the situation must be distinguished from a similar excusal that is prompted by the State. Grijalva, supra, held that any State's unused peremptory strikes remaining at the end of voir dire would not remove the harm of an erroneous excusal of a qualified juror. This conclusion is based on the notion that otherwise the State would receive three unfair advantages over the defense: (1) hindsight in exercising peremptory strikes that was denied to the defense; (2) the benefit of striking last that is statutorily given to the defense by Art. 35.13, V.A.C.C.P.; and (3) the benefit of having the court strike, on behalf of the State, a venireman on appeal after voir dire error has been pronounced. But *Grijalva* is founded on the notion that the State *caused* the improper excusal by issuing a challenge for cause, and is therefore penalized because of the advantages it would otherwise receive by holding a peremptory strike back. Where the trial judge, not the State, is solely responsible for the improper excusal, the justification for penalizing the State under *Grijalva* disappears. It is entirely appropriate in such a case to fall back on the rationale in Weaver, supra, Payton, supra, and Culley, supra, and assess harm to the defendant on whether the state had remaining peremptory strikes left at the close of the voir dire."

Bell, supra at 795-6.

Thus, just as in the case now before the Court:

***71** "In the case at bar, the State had remaining at the conclusion of jury selection a total of one peremptory strike. Unlike *Grijalva,* however, the venire member in this case was

not excused via challenge for cause by the State. The trial judge excused him *sua sponte*. The State in no way prompted the erroneous excusal nor did it have an opportunity to timely exercise a peremptory challenge against him had it wished to. In short, this venire member was never passed first to the State and then to the appellant for challenges according to the requirements of Art. 35.13, V.A.C.C.P. Thus, the 'corruption of the peremptory strike practice' that gave the State 'an unfair advantage,' so condemned in Grijalva, supra at 424, is absent from this case."

[5] We find that Grijalva, supra, is distinguishable from this case since the trial judge excused the venireman *sua sponte* rather than as the result of a challenge for cause by the State, thus depriving the State of the orderly opportunity to challenge peremptorily. Therefore, we hold that the existence of unused peremptory strikes at the conclusion of the jury selection process renders the improper excusal of the venireman harmless. Culley, supra; Weaver, supra.

[6] In this same ground of error, appellant also appears to complain that the *sua sponte* nature of the trial court's action in excusing Noble was in and of itself sufficient to require reversal. Although the trial court should not have on its own motion excused the venire member on grounds which do not show an absolute disqualification under the authority of Art. 35.19, V.A.C.C.P., appellant's objection at trial did not address the *sua sponte* nature of the trial court's action. Thus, appellant's complaint on appeal does not comport with his objection at trial. This error is not preserved for review. Hernandez v. State, 643 S.W.2d 397 (Tex.Cr.App.1982);

Esquivel v. State, 595 S.W.2d 516 (Tex.Cr.App.1980), *cert. denied*, 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980); Moore v. State, 542 S.W.2d 664 (Tex.Cr.App.1976), *cert. denied*, 431 U.S. 949, 97 S.Ct. 2666, 53 L.Ed.2d 266 (1977). Even if error had been preserved, it was harmless since the State had peremptory strikes left. See discussion, supra. Appellant's eleventh ground of error is overruled.

Although appellant does not challenge the sufficiency of the evidence, a brief recitation of certain relevant facts is assistive in disposing of appellant's remaining grounds of error.

The victim of the offense was a security guard at the Holiday Inn in San Antonio. He and another security guard were dispatched early in the morning of March 31, 1979, to investigate a complaint from a guest in room 494 that someone was trying to break into her room. Room 494 was occupied by three women from Mexico City. Shortly after the front desk clerk had sent the two unarmed security guards to investigate the complaint, the guest in room 494 called again and stated she thought she had heard gunshots. Eventually the front desk clerk found the bodies of the two security guards lying in a first floor stairwell. One victim had his hands handcuffed behind his back and both had been shot at close range with a .38 caliber Arminius Titan Tiger pistol. [FN4] Appellant had acquired a .38 caliber Arminius Titan Tiger pistol several days earlier.

> FN4. A firearms and toolmark examiner for the San Antonio Police Department testified that the make of the pistol used in the offense could be and was

BEST AVAILABLE COPY

determined by bullets recovered from the body of the victim.

The evidence also reflected that at the time of the offense appellant and the three young women who were traveling with him occupied the room across the hall from room 494. The three young women, seventeen-year-old Victoria Franklin, sixteen-year-old Rhonda Bearden, and seventeen-year-old Lisa Laursen, were working as prostitutes in the various cities the group visited. All three women testified at the trial. On the evening before the offense, the appellant had mentioned that one of the women from Mexico City was wearing what he considered to be expensive jewelry. According to Franklin's testimony, appellant *72 awakened her on the morning of the offense and told her he had disguised himself and, armed with the .38 caliber pistol, had attempted to gain entry to the room occupied by the women from Mexico City. Before gaining entry, he was interrupted by the two security guards. The guards were escorting appellant down the stairs to the front desk in order to establish his identity when appellant's weapon, which was in his waistband, fell to the floor. He grabbed the gun, handcuffed one of the guards, took their money, shot and killed both of them, and returned to his room. Upon his request, Franklin went to the scene of the murders and wiped the area with a towel to remove any fingerprints. The victims had not yet been discovered and Franklin saw them lying in the stairwell. She then returned to the room and disposed of the bullets and spent shells by flushing them down the toilet.

Appellant and Franklin later told Bearden about the murders. While in Colorado awaiting extradition to Texas, appellant also confessed to Mark Stanley Seiver, another inmate.

In his first ground of error, appellant contends that the trial court erred in finding that Franklin was not the common-law wife of appellant and in permitting her to testify against appellant in violation of the husband-wife privilege embodied in Art. 38.11, V.A.C.C.P. [FN5]

> FN5. Art. 38.11, V.A.C.C.P., provided in pertinent part, at the time of trial:
> "Neither husband nor wife shall, in any case, testify as to communications made by one to the other while married.... The husband and wife may, in all criminal actions, be witnesses for each other, but except as hereinafter provided, they shall in no case testify against each other in a criminal prosecution...."

In response to defense counsel's leading questions during a hearing held outside the presence of the jury, both Franklin and appellant testified that they had entered into a valid common-law marriage shortly after Franklin's seventeenth birthday "on or about the latter part of January into February 1979" while they were living together in Oklahoma. During cross-examination, however, Franklin admitted that appellant never introduced her to anyone as his wife, that she did not tell other people that they were "married" until after her arrest several months later, and that the vows were secret. [FN6] Franklin also testified that a couple of weeks after they exchanged these "secret vows" Rhonda Bearden entered the

picture and appellant was introducing Bearden as his wife. Lisa Laursen also occasionally acted as appellant's wife. It was Laursen who registered as appellant's wife at the Holiday Inn in San Antonio. Franklin also testified that Bearden, not Franklin, shared appellant's bed during their travels.

> FN6. Franklin described the "vows" as follows:
> "Q. Now, what do you mean he made vows to you, what did he tell you?
> "A. That he wanted me to be his wife.
> "Q. What did you tell him about that? "A. I just looked at him and said, 'Well'.
>
> * * *
>
> "Q. Did he tell you anything further at that time?
> "A. Yes. He said he wanted me to be his wife and that to do as he--you know--to share responsibilities and do as, you know, he tells me to.
> "Q. And to do as he told you to do?
> "A. Yes."

Assistant District Attorney Keith Burris testified that he specifically asked Franklin in September of 1979 if she had ever been married to appellant and she "emphatically" denied the same. He testified that she reaffirmed that statement several other times prior to trial.

According to the testimony of Bill Blagg, who was employed as an Assistant District Attorney for Bexar County, he also interviewed Franklin in September of 1979 regarding her relationship to appellant. He testified that Franklin told him

she had never represented herself as appellant's wife, although Bearden had, and that she described her relationship with appellant as a "working relationship, that of a prostitute and a pimp." Blagg further testified Franklin "was given every opportunity to say she was the wife of Silky [appellant] or there was a husband-wife relationship. ***73** She never indicated it nor did I see any evidence of it when I looked for it."

The record further reflects that while the incarcerated appellant was awaiting extradition for the instant offense, he signed two "Applications for Representation by Public Defender" before an Oklahoma judge "under penalty of perjury," wherein he swore he was single. Those applications were executed on April 26, 1979, and June 27, 1980. Appellant's explanations for these two "perjured" statements was that each time there was a woman present (different each time) who he wanted "to catch." He also testified that "[r]umors had it that three or four statements were against me and at the time I didn't want to claim nobody, so I lied. I lied. I sure did."

Appellant's testimony on this issue was full of inconsistencies and self-serving statements. When questioned about how many women he had represented as his wife over the years, his response was "[i]t depends on the circumstances and the situation. * * * Man, I know too many women. I know too many. I can't keep up with names, dates, all that, man." Although appellant testified, contrary to Franklin, that the marriage was not "secret" and that he, at some point, had told relatives and "numerous people" about the marriage, not one

shred of documentary evidence or other testimony was introduced to support that claim. In fact, all the evidence, including the testimony of Franklin, directly contradicted that claim. It could be inferred from the record that appellant's first open claim to the common-law marriage came after the realization that Franklin was going to be, in the words of appellant in his brief, the "State's most effective witness against the defendant."

[7][8][9][10] Since the alleged marriage occurred in Oklahoma, the claim must be tested according to the substantive laws of that state which were introduced at trial by the appellant and considered by the trial judge in making his decision. McArthur v. Hall, 169 S.W.2d 724 (Tex.Civ.App.--Fort Worth 1943). When considering the procedural rules applicable in the instant case, however, we must refer to the laws of the forum. Nevertheless, we note that in both Oklahoma and Texas, the burden is on the proponent of a common-law marriage to prove the same, by clear and convincing evidence in Oklahoma and by the preponderance of the evidence in Texas. Maxfield v. Maxfield, 258 P.2d 915 (Okl.1953); In re Estate of Stinchcomb, 674 P.2d 26 (Okl.1983, on rehearing); Faglie v. Williams, 569 S.W.2d 557 (Tex.Civ.App.--Austin 1978). We find the appellant failed to meet his burden.

[11] A claim of common-law marriage in circumstances such as this must be closely scrutinized by the courts, and the agreement of marriage should be specific on both sides. Hightower v. State, 629 S.W.2d 920 (Tex.Cr.App.1981); Bodde v. State, 568 S.W.2d 344 (Tex.Cr.App.1978), *cert.*

denied, 440 U.S. 968, 99 S.Ct. 1520, 59 L.Ed.2d 784 (1979); Chatman v. State, 513 S.W.2d 854 (Tex.Cr.App.1974); Krzesinski v. State, 169 Tex.Cr.R. 178, 333 S.W.2d 149 (App.1960); Welch v. State, 207 S.W.2d 627 (Tex.Cr.App.1948).

The Oklahoma Supreme Court in Stinchcomb, supra, summarized the requisite elements of a common-law marriage in Oklahoma as follows:
"A party asserting a common law marriage must prove the following elements: an actual and mutual agreement between the spouses to be husband and wife; a permanent relationship; an exclusive relationship, proved by cohabitation as man and wife; and the parties to the marriage must hold themselves out publicly as husband and wife." Id. at 28-29.

The Court earlier held:
"In this jurisdiction it is the well-established rule that a consensual or so-called common-law marriage is a status to which a mutual consent is essential, consent being the threshold by which the status is reached but *which status is not attained until there has been a holding out by the parties of themselves as husband and wife and a public assumption *74 of the relation.*" [FN7] In re Trope's Estate, 190 Okl. 453, 124 P.2d 733, 736 (1942).

> FN7. All emphasis throughout this opinion is supplied by the author unless otherwise noted.

The evidence elicited relative to this issue, as summarized above, clearly reflects that the appellant failed to prove, as a matter of law, all of the elements required by Oklahoma to

establish a common-law marriage. We have serious reservations as to whether the testimony adduced raises even one of the requisite elements.

The appellant's motives for attempting to raise the issue at the time of trial are quite clear. His testimony, however, and that of Franklin, failed to establish that there was an actual and *mutual* agreement; or that his intent was to enter into a *permanent* and *exclusive* relationship, see Marshall v. State, 537 P.2d 423 (Okl.Cr.App.1975); or that the cohabitation of the two was not "irregular, limited or partial," In re Miller's Estate, 182 Okl. 534, 78 P.2d 819 (1938); see also Quinton v. Webb, 207 Okl. 133, 248 P.2d 586 (1952); Richard v. Richard, 172 Okl. 397, 45 P.2d 101 (1935); or, most certainly, that either of them openly held themselves out as husband and wife, see Marshall v. State, 537 P.2d 423 (Okl.Cr.App.1975); Richard, supra.

We can only conclude that there was insufficient evidence to establish that any marriage "had in fact been agreed to, consummated and adhered to" during the short time appellant and Franklin resided under the same roof. In re Phifer's Estate, 629 P.2d 808, 809 (Okl.App.--Div. No. 2 1981). We agree with the Oklahoma Supreme Court's ultimate holding in Miller's Estate, supra at 828, that the appellant's "subsequent actions, heretofore related, were so inconsistent with the idea of a marriage relationship that [his] testimony regarding the same became inherently improbable and was therefore properly disregarded by the court."

Furthermore, in Hightower, supra, we held:

"The existence of a common-law marriage is an issue of fact to be determined by the trier of the fact. Warren v. Kyle, 565 S.W.2d 313 (Tex.Civ.App.-- Austin 1978, no writ). We find that appellant's failure to complain that the issue of a common-law marriage was not submitted to the jury, or to request that it be submitted, waived the error he now seeks to present." *Id.* at 924.

In the instant case, as in *Hightower,* the issue of the common-law marriage was not established as a matter of law and we can find no request from the appellant that the issue be submitted to the jury. No such issue was submitted. The error is waived.

Appellant's first ground of error is overruled.

In his second ground of error appellant contends that the trial court erred in permitting Mark Stanley Seiver to testify against the defendant where Seiver's knowledge of the case came to him "by virtue of his status as the defendant's legal advisor, in violation of the common law attorney-client privilege."

Seiver testified that he met the appellant while both were incarcerated in the Denver County Jail in Colorado. The appellant dismissed the public defender who was representing him and enlisted Seiver's assistance in contesting his extradition to Texas for the instant offense inasmuch as Seiver was fighting his own extradition to California and had assisted other inmates in similar proceedings. Seiver was not and had never been licensed to practice law, he had never attended law school, and he had only a pre-law undergraduate

degree. Seiver testified he told appellant he was studying law in college and appellant knew he did not have "a bar card" and was not licensed to practice law. During the course of his relationship with Seiver, appellant confessed to the instant offense and revealed many details of the murder. Seiver testified that the incriminating statements were not necessary for the preparation of the extradition documents. These incriminating statements were admitted at trial over the appellant's objection that the statements were subject to a common-law attorney-client privilege.

***75** The appellant does not argue that he believed the witness was a licensed attorney and was misled to his detriment. Instead, he contends that Seiver was acting as his "legal advisor" and as such is entitled to the same privileges as any licensed attorney. His authority for this argument is apparently premised both on his interpretation of the common-law attorney-client privilege and on Farretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), which held that an individual has a constitutional right to defend himself in a criminal proceeding.

Article 38.10, V.A.C.C.P., specifically provided at the time of trial that "an *attorney at law* shall not disclose a communication made to him by his client during the existence of that relationship, nor disclose any other fact which came to the knowledge of such attorney by reason of such relationship." Article 38.10 further provided that *all* persons who are not otherwise explicitly enumerated in the Code are competent to testify, "whatever may be the relationship between the defendant and witness...." [FN8]

FN8. The attorney-client privilege was recodified in the Texas Rules of Criminal Evidence Rule 503.

[12] Although the courts in Texas have extended this privilege to "persons who are the media of communication" [FN9] between the attorney and the client, we are unable to discover any authority or rationale to justify the appellant's request that we further extend the privilege to include communications between a defendant and anyone who may take it upon himself to give legal advice to that defendant. The ramifications of such a holding would be beyond calculation.

FN9. Burnett v. State, 642 S.W.2d 765 (Tex.Cr.App.1982).

Moreover, such a result would actually be contrary to the original purpose of the common-law privilege which was to assure that since a layman should "have recourse to the assistance of *professional* lawyers ... he should be able to place unrestricted and unbounded confidence in the *professional* agent." 8 Wigmore, Evidence, § 2291, pp. 546-547, (McNaughton rev. 1961), quoting from *Anderson v. Bank*, 2 Ch.D. 644, 649 (1876). As was explained in *Wigmore*, supra:

"There is no ground for encouraging the relation of client and legal adviser except when the adviser is one who has been formally *admitted to the office of attorney or counselor* as duly qualified to give legal advice.

That the person consulted is in fact practicing, without formal sanction of the court, is certainly not sufficient.... According

to the proposed Uniform Rules of Evidence, a 'lawyer,' for purposes of the privilege, is any 'person authorized ... to practice law in any state or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer.'
Finally, a mere *student at law,* aspiring to future entrance to the profession, is without the privilege, however much legal skill he may possess in comparison with some of those who are within it." (emphasis in original) Wigmore, supra at 580-581.

We are also unconvinced by the appellant's argument that by permitting self- representation in *Farretta,* supra, the Supreme Court also authorized the extension of the attorney-client privilege to include "jailhouse lawyers." It would seem that a clearer basis for appellant's proposition would be found in Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969), wherein the Supreme Court held that an inmate's right to access to the courts, founded in the Due Process Clause, prohibits prison regulations which bar inmates from furnishing legal assistance to each other "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief." Id., 393 U.S. at 490, 89 S.Ct. at 751. The Supreme Court further held that the prisons could place "reasonable restrictions and restraints" upon the inmates in the exercise of this right. Id., 393 U.S. at 490, 89 S.Ct. at 751.

We could find no specific authority, however, and appellant fails to refer us to any, ***76** to support the proposition that permitting one inmate to assist another in legal matters

automatically elevates that inmate to the role of an attorney at law with all the privileges, responsibilities, and restrictions which accompany a formal license to practice law. We do note, however, that the Louisiana Supreme Court in State v. Spell, 399 So.2d 551 (La.1981), specifically held contrary to appellant's contention in a fact situation similar to and perhaps even more compelling than appellant's. In *Spell,* the defendant contended his statements made to a fellow inmate who was *assigned* to the law library at the prison "to help other prisoners with their legal problems by writing letters, preparing pleadings, and otherwise giving them whatever advice he could" but who was not an attorney and who did not hold himself out as a lawyer were privileged communications. The court held, even under those facts, communications between the two inmates were not subject to the attorney-client privilege.

In light of the foregoing, appellant's second ground of error is overruled.

In his third ground of error, appellant contends that the trial court erred in permitting State's witness Robert Rast, a psychologist, "to testify at the punishment stage of the trial where the witness was a surprise witness and although extensive discovery had been made prior to trial the State had never disclosed that particular witness."

The record reflects that pursuant to appellant's motion, the trial court ordered the State to make known to the defense the names and addresses of its proposed witnesses. The list was furnished to the appellant at the ordered time and three

psychiatrists were included on the list. Rast's name was not included. Appellant's attorney conducted substantial trial preparations in order to effectively cross-examine the three psychiatric witnesses listed. None of those three witnesses were called by the State. Instead, at the punishment phase of the trial, the State called Rast. Appellant objected to the testimony of Rast on the grounds that the witness was a surprise and the defense was not prepared to meet, rebut, or explain the testimony of the witness. The record further reflects that Rast was not contacted by the State regarding testifying in this case until the day before his testimony. Both the prosecutor and the trial judge stated that in a conference conducted on the same day as Rast was contacted, the prosecutor had informed appellant's counsel that Rast would be called as the State's final witness and the three other psychiatric witnesses would not be called. Appellant's attorney stated that he did not recall that Rast's name had been specifically mentioned at the conference.

In a hearing held outside the presence of the jury, Rast testified that he was a clinical psychologist who had never examined appellant nor conferred with him. The following exchange then occurred:

"THE COURT: Mr. Cazier [appellant's attorney], I find it difficult to see how the Defendant would be harmed by not having been advised that this particular person is going to testify. You are not being deprived of any information that the State had previously that hasn't unfolded before all of us in the last few days of this trial with the only exception of this doctor's qualifications.

"I'll let the State establish his qualifications to give an expert

opinion now, and then *if you feel there is something about that that you need additional time to prepare for, I'll consider giving you that time.*
"MR. CAZIER: *Okay.* Let me say for the record ... I have obviously no preparation whatsoever to respond to this witness' testimony? [sic]"

After examination of Rast by both the State and appellant's attorney, the Court further stated:
"I'm trying to be just as fair as I can with you.
"Can you assist me in telling the areas of cross-examination that you would like to explore that somehow you are inhibited by not knowing this was the man that is going to be on the stand? I know you were loaded for bear on the other two doctors."
***77** "MR. CAZIER: Let me ask this witness a couple more questions and *I might.*
"THE COURT: That may be why the State is not calling them. They can do that."

After a few more questions by appellant's counsel, the court held that the witness would be permitted to testify. Appellant's attorney then stated, "We do object for the record." No request was made by the appellant for any continuance, nor did the appellant state in what way he was harmed by the notice failure. Before the jury, Rast testified as to his qualifications and then in response to a hypothetical question propounded by the State testified that the person described was a sociopath and would probably continue to commit future acts of violence. Rast was closely cross-examined by appellant's attorney about any possible bias and

about his knowledge of current authoritative psychiatric literature. During Rast's testimony, appellant further objected because the hypothetical question recited items that were not in evidence and because the opinion of the psychologist as to future dangerousness was not admissible in that the opinion invaded the province of the jury and called for speculation on the part of the witness. Both objections were overruled.

[13][14] The names of witnesses should be disclosed, upon proper motion by the appellant, if they will be used by the State at any stage in the trial. Hightower v. State, 629 S.W.2d 920 (Tex.Cr.App.1981); Young v. State, 547 S.W.2d 23 (Tex.Cr.App.1977). The standard of review when a witness is permitted to testify who was not included on the witness list is whether the trial court abused its discretion in allowing such witness to testify. Pinkerton v. State, 660 S.W.2d 58 (Tex.Cr.App.1983); Hightower, supra; Lincoln v. State, 508 S.W.2d 635 (Tex.Cr.App.1974). See also Bridge v. State, 726 S.W.2d 558 (Tex.Cr.App.1986).

In Hightower, supra, this Court explained the following:
"Among the factors which will be considered by this Court in determining whether there has been an abuse of discretion is a showing of bad faith on the part of the prosecutor in failing to disclose ahead of time the name of the witness. See Clay v. State, 505 S.W.2d 882 (Tex.Cr.App.). [See also Pinkerton, supra; *Lincoln,* supra.] Another such factor is whether the defendant can reasonably anticipate that the witness would testify although his or her name was not included within the witness list. See Smith v. State, 540 S.W.2d 693

(Tex.Cr.App.)." [citations in brackets added]. Hightower, supra at 925.

[15] In the instant cause, it is undisputed that Rast's name was not on the witness list. Appellant has not shown, however, that the State's failure to include the name was in bad faith. Both the prosecutor and the trial court stated that appellant's attorney was notified of Rast's testimony on the same day that Rast was initially contacted by the State. Rast's testimony failed to show that he was particularly biased towards one side or the other. He testified that *he had never before testified for the prosecution in a criminal prosecution* and was not familiar with anyone on the District Attorney's staff. Furthermore, we note that the trial court did all that it could to insure appellant was not unfairly harmed by Rast's testimony by offering to consider a postponement so that appellant could prepare for the testimony, an offer upon which appellant failed to act. Appellant failed to adequately explain to either the trial court or this Court in what way the substitution of Rast's testimony regarding the hypothetical restricted his ability to cross-examine him. See Toler v. State, 546 S.W.2d 290 (Tex.Cr.App.1977).

Appellant, in the same ground of error, asserts that "prosecutors" have seized on the hypothetical question method of presenting psychiatric testimony at the sentencing hearing in a capital murder case in order to avoid the protections afforded capital murder defendants by Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). He contends that, if this is to be permitted, the defense should

at least be *78 given fair notice of the witnesses the State will use.

As the discussion, supra, shows, we do not find that the appellant was denied fair notice under the particular facts of this case. Furthermore, Estelle v. Smith, supra, held that the defendant's Fifth Amendment privilege against compelled self-incrimination was violated in that he was not advised prior to his pretrial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at a capital sentencing procedure, as subsequently occurred. We are unconvinced that the holding in *Estelle v. Smith* has any applicability where there is no Fifth Amendment involvement. Moreover, since appellant filed his brief in this case, the Supreme Court in Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), specifically rejected the argument that the use of the hypothetical question as to future dangerousness in a death penalty case such as this requires more stringent rules of evidence than are ordinarily applied. Id., 103 S.Ct. at 3400.

In light of all of the above, we cannot find that the trial court abused its discretion in allowing Rast to testify. Pinkerton, supra; Hightower, supra.

Accordingly, appellant's third ground of error is overruled.

In his fourth ground of error, appellant contends the trial court erred in refusing to permit appellant's counsel to cross-examine and thereby impeach Rhonda Bearden concerning the underlying facts and details of a felony committed by her. In his fifth ground of error, appellant contends the trial court

erred in refusing to issue out-of-state compulsory process for two of the victims of the extraneous offenses committed by Bearden in order to offer evidence concerning the underlying details of the offenses. Appellant and the State in their respective briefs discuss both grounds of error together. We will do the same.

Bearden admitted on direct examination that she was certified as an adult in the juvenile court in Colorado and convicted of second degree kidnapping and violent crime, offenses which occurred in Colorado shortly after the instant offense. During cross-examination, Bearden initially denied that she was promised anything or stood to gain anything by her testimony against appellant. Under further questioning, she admitted she was serving a ten to twelve year prison term and in exchange for her testimony in the instant trial her sentence was to be reduced to three years. Nevertheless, she continued to assert that the sentence reduction was not her reason for testifying. Appellant's counsel further elicited from Bearden that she was originally charged in Colorado with the offenses of first degree kidnapping, violent crime, aggravated robbery, criminal conspiracy, second degree assault, aggravated motor vehicle theft, first degree assault, and conspiracy to commit aggravated robbery.

Appellant's counsel then announced to the court that he proposed "to go into the underlying transactions for which these criminal charges arose." The court recessed the jury and appellant's counsel questioned Bearden outside the presence of the jury.

During this hearing, Bearden testified that she and Franklin were involved in two criminal transactions, occurring on consecutive days in two separate Colorado towns. On the first day, she and Franklin entered the home of an elderly couple after telling them they wanted to use the telephone. They then left the house and returned a few minutes later on the pretext of again using the telephone. Upon once more gaining entry to the home, Bearden handed Franklin a gun and the two robbed the couple, obtaining less than thirty dollars. During the course of the robbery, Franklin put the gun against the chest of the female victim and demanded that she give them a ten dollar bill that the victim was reluctant to relinquish. Franklin and Bearden then tied the hands and feet of the couple and left.

The next day, the pair, along with a third woman, met a man at a bar who was intoxicated and who was carrying a lot of money. The three women and the man left the bar together in the man's car. Bearden later ***79** hit the man on the back of the head with a gun, apparently while he was engaged in sexual intercourse with Franklin in the back seat of the car. Bearden threatened to kill the still-conscious victim if he did not give them his money. When he told the women he had left his money at the bar, the group returned to the bar where he attempted to grab Bearden. Bearden fired a shot into the ceiling and escaped with Franklin in the victim's car. They were arrested shortly thereafter.

Appellant's counsel offered the above-described testimony on the theory that, "[i]t goes to the credibility of the witness. It goes to her motive to testify and it goes to a similarity

between the two transactions, specifically the use of a gun, the tying of the hands and feet of the elderly couple, threat of death." The trial court found the testimony to be inadmissible.

The appellant also requested that two of the Colorado victims be subpoenaed from out-of-state to testify as to the facts of the prior convictions "for purposes of showing the credibility of the State's witness." The trial court denied the request, holding that the testimony would lack materiality. On appeal, appellant cites only Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), as authority for his contentions, claiming that the trial court's actions deprived him of his Sixth Amendment right to confrontation and compulsory process.

In Davis, supra, the defense attempted to impeach a crucial witness for the prosecution by showing that he was on juvenile probation at the time he was assisting the police. The defense claimed that fear or concern of possible jeopardy to his probation could have influenced the witness' identification of the defendant and his testimony at trial. The trial court, however, issued a protective order preventing any reference to the witness' juvenile record. Although defense counsel was permitted to ask the witness general questions concerning *whether* the witness might be biased, he was not permitted to argue the specific reason *why* the witness might have been biased or impartial.

The Supreme Court found that the trial court's actions in restricting the cross-examination of the witness as to possible biases prevented the defense from presenting evidence which could have seriously affected the credibility of this crucial

witness. While the Supreme Court recognized that the State had a legitimate interest in protecting the anonymity of juvenile offenders, the Court held the right of confrontation "*in this setting* " was paramount. 415 U.S. at 319, 94 S.Ct. at 1112.

Thus *Davis'* ultimate holding was that a defendant must be allowed, within certain limits, the freedom to expose a particular witness' possible biases and prejudices against the defendant. In Texas, although at the time of trial Art. 38.29, V.A.C.C.P., provided that only final convictions or probations wherein the period of probation had not expired may be used for purposes of *general* impeachment, in accord with the holding in Davis, supra, the accused is given great latitude in showing any fact which would tend to establish ill feeling, bias, or motive for fabrication on the part of any witness testifying against the accused. Harris v. State, 642 S.W.2d 471 (Tex.Cr.App.1982); Bates v. State, 587 S.W.2d 121 (Tex.Cr.App.1979); Carrillo v. State, 591 S.W.2d 876 (Tex.Cr.App.1979); Simmons v. State, 548 S.W.2d 386 (Tex.Cr.App.1977); Evans v. State, 519 S.W.2d 868 (Tex.Cr.App.1975); Burkhalter v. State, 493 S.W.2d 214 (Tex.Cr.App.1973).

[16] We note that in the instant cause appellant's counsel was permitted to establish such a bias or motive. The jury learned that Bearden had been originally charged with eight offenses, that she had been convicted of second degree kidnapping and violent crime, *and that her ten to twelve year sentences would be reduced to three years after her testimony in the instant cause.* The danger perceived and denounced in Davis, supra,

did not arise here. The appellant was able to fully explore the possible prejudices and biases of Bearden in an attempt to affect her credibility. The *details* of the offenses would not have been probative of bias or motive to testify falsely. See ***80**Murphy v. State, 587 S.W.2d 718 (Tex.Cr.App.1979); Driehs v. State, 164 Tex.Cr.R. 455, 301 S.W.2d 123 (App.1957).

The appellant also contended, however, that the excluded testimony was admissible on the basis that it was "similar." By this we assume he meant that the offenses committed in Colorado were similar in means of commission to the instant offense and that the introduction of the details of the extraneous offenses could have shown that it was possible that the witnesses and not the appellant committed the instant offense. During his closing statement, appellant's counsel ably argued that scenario.

[17][18] Ordinarily, evidence of offenses committed by parties other than the defendant is inadmissible. Franklin v. State, 606 S.W.2d 818 (Tex.Cr.App.1978); Florio v. State, 532 S.W.2d 614, 618 (Tex.Cr.App.1976); Loy v. State, 502 S.W.2d 123 (Tex.Cr.App.1973); Ferrell v. State, 429 S.W.2d 901 (Tex.Cr.App.1968); Daltwas v. State, 375 S.W.2d 732 (Tex.Cr.App.1964); Burke v. State, 642 S.W.2d 197 (Tex.App.--Houston [14th] 1982). [FN10] If the evidence proferred by the defendant is neither inconsistent with nor precludes his guilt, the evidence is not probative of any material issue and is properly excluded. Franklin, supra; Florio, supra; Loy, supra; Dickson v. State, 492 S.W.2d 267 (Tex.Cr.App.1973).

FN10. In Franklin, supra, we held that the trial court properly excluded testimony that a man the defendant claimed had borrowed his car on the night in question had later been arrested and charged with a similar offense; Florio, supra, held that it was proper to exclude evidence that 19 days prior to the offense someone other than the defendant attempted to gain entrance to an apartment in the same manner in which the defendant was charged with entering the complainant's apartment; in Ferrell, supra, we held the trial court did not err in refusing to allow the defendant to prove that another robbery was committed while the defendant "was in jail by robbers using the same type of disguise, weapon and modus operandi"; in Loy, supra, and Daltwas, supra, we held the trial court properly refused to allow the defendants to introduce evidence of the convictions of the defendants' cohabitants for possession of the same substances as involved in the current causes; and in Burke, supra, it was held that the proffered testimony of a police officer that another man who resembled the composite picture of the rapist in the instant case was about to go to trial for a similar abduction of a girl from the same general area was properly excluded. Compare Jackson v. State, 551 S.W.2d 351 (Tex.Cr.App.1977); and Holt v. U.S., 342 F.2d 163 (5th Cir.1965), wherein the defense was misidentification and it was held to be error to forbid introduction of testimony showing that the defendant had actually *previously been misidentified* as a

> particular person who was known to have committed similar offenses as the ones at bar.

In the instant case, the details of the offenses committed by Bearden and Franklin as shown by the appellant's questioning of Bearden outside the presence of the jury, were neither probative of nor inconsistent with the guilt of appellant in the instant cause. The jury was aware of the violent offenses with which Bearden was charged and the convictions which resulted. Appellant's bill of exception failed to demonstrate any connection in similarity or relevance to the instant case, especially when one considers the direct evidence of appellant's guilt, including his confession to Seiver, a person not directly related to this offense. See Williams v. State, 662 S.W.2d 344 (Tex.Cr.App.1983). Given its lack of connection to the offense charged, the trial court did not err in excluding the evidence of the details of the extraneous offenses.

Grounds of error four and five are overruled.

In his sixth ground of error, the appellant contends that the trial court incorrectly denied the indigent appellant "the effective assistance of counsel and compulsory process by not allowing sufficient time and funds to permit defense counsel to obtain the depositions of witnesses in Mexico."

The record reflects that on July 29, 1981, appellant filed a motion to take the depositions of the three women who were residents and citizens of Mexico City, Mexico, and who were in room 494 of the Holiday Inn at the time of the murders.

On July 30, 1981, the trial court heard appellant's motion and ordered the taking of written interrogatories of the three witnesses by a United States diplomatic or consular officer in Mexico City. The trial court ordered appellant's counsel to prepare ***81** his interrogatories and whatever orders were necessary "to bring this about." The commission to take the depositions, apparently prepared by appellant, was signed by the court on August 4, 1981, and forwarded to the United States Embassy in Mexico.

On August 31, 1981, the day the case was set for trial on the merits, appellant filed and urged a motion for continuance asserting, among other things (including that he had not yet been accorded a pretrial hearing on his motion to suppress), that he had been unable to obtain the depositions of the women because the embassy required a $100.00 fee and a court reporter and an interpreter from the United States. The trial court, necessarily aggrieved at this complaint, reminded appellant's counsel that he had agreed to the written interrogatories with the understanding that counsel would work out the details. The court then asked counsel if it was not possible for the witnesses to simply write out their answers before the officer without the necessity of having a court reporter transcribe the answers. Counsel responded that that possibility had not been discussed. The court then instructed counsel that if necessary the official court interpreter could translate the interrogatories into Spanish and the handwritten answers into English. Appellant's counsel stated, however, that all of the witnesses spoke English. The court then went into other matters, including the motion to suppress, without objection from the appellant.

Although the record does not affirmatively reflect the trial court's authorizing the fee payment, appellant in his brief admits the same. The record does contain a copy of a letter, dated September 2, 1981, and filed in the trial court on September 3, 1981, from appellant's counsel to officials at the embassy requesting that the depositions be taken by permitting the witnesses to give their answers in writing in English. The letter also enclosed a $100.00 check to the embassy for its fee. On September 2, 1981, after hearing testimony on the motion to suppress, the trial court finally overruled appellant's motion for continuance after counsel stated "We have no further argument on that motion...." Voir dire examination of the prospective witnesses began on that date. The State began presenting its evidence on September 10, 1981, and rested on September 15, 1981. The defense rested on the same day without presenting evidence.

The record further shows that the $100.00 check and the unanswered interrogatories were returned to appellant's counsel by the embassy pursuant to a request from counsel dated September 21, 1981.

The trial court has wide discretion in either granting or denying applications to take depositions. Art. 39.02, V.A.C.C.P.; Aguilar v. State, 468 S.W.2d 75 (Tex.Cr.App.1971); Beard v. State, 481 S.W.2d 875 (Tex.Cr.App.1972); McKinney v. State, 491 S.W.2d 404 (Tex.Cr.App.1973); James v. State, 546 S.W.2d 306 (Tex.Cr.App.1977).

In this instance, the trial court authorized the taking of written depositions by a diplomatic or consular officer in Mexico City in accordance with Arts. 39.06 and 39.09, V.A.C.C.P. Appellant complains that "the bottom line is that the deposition testimony was never obtained because the court would not authorize the necessary expense." We interpret "the bottom line," however, to be that appellant failed to promptly follow through with the trial court's instructions to pursue the matter.

[19] Although appellant does not directly contest the denial of the motion for continuance, he contends that the trial court's failure to grant him sufficient time to obtain the depositions amounted to a denial of the depositions. We note, however, that trial counsel was appointed on March 10, 1981; trial counsel was notified by mail on May 29, 1981, that the trial on the merits was to begin on August 31, 1981; and yet the motion for depositions was not filed until July 29, 1981. The trial court heard and granted the motion promptly. The record reflects the trial court was not notified of any problems with the depositions *until the day of trial.* Even then, he did not refuse to permit the depositions. He authorized the payment of ***82** the fee to the embassy and suggested reasonable solutions to the other problems appellant's counsel raised with regard to the depositions. Appellant's counsel neither raised objections to the trial court's suggestions nor contended that the depositions were not achievable by the alternative means suggested by the trial court. At no time did the trial court refuse to permit the depositions.

[20] Appellant's argument that the trial court denied him the effective assistance of counsel and compulsory process by not providing sufficient time and funds for a court reporter and an interpreter to fly to Mexico City to obtain the depositions of the witnesses is without merit. Appellant had placed himself in the position of trying to obtain, in one month's time, depositions from witnesses outside the country. He then did not diligently pursue the matter to a satisfactory conclusion.

In addition, we find that the record does not reflect that the trial court specifically denied a request from appellant for funds to obtain the depositions. The trial court authorized the payment of the necessary fee and offered a reasonable and frugal method of obtaining the depositions. See Aguilar, supra; Langston v. State, 416 S.W.2d 821 (Tex.Cr.App.1967). See also Quin v. State, 608 S.W.2d 937 (Tex.Cr.App.1980); Cadd v. State, 587 S.W.2d 736 (Tex.Cr.App.1979).

[21] Furthermore, under Art. 26.05, V.A.C.C.P., counsel is entitled to investigative expenses only *after* they are incurred; even then, reimbursement is discretionary with the court, and refusal to pay expenses before they are incurred is not an abuse of discretion. Wallace v. State, 618 S.W.2d 67 (Tex.Cr.App.1981).

Appellant's sixth ground of error is overruled.

In his seventh ground of error, appellant contends the trial court erred in permitting the State to introduce into evidence during the punishment phase, over appellant's objections, State's Exhibit No. 51, which was a federal judgment and commitment dated March 19, 1973, showing that appellant

pled guilty to "possession of stolen mail containing a U.S. Treasury check" and was sentenced under the Federal Youth Corrections Act, 18 U.S.C. § 5010(b). Appellant contends that the exhibit was inadmissible because the Federal Youth Corrections Act provides for automatic expungement of the conviction upon completion of the sentence. See 18 U.S.C. §§ 5010(b), 5017, 5021; United States v. Arrington, 618 F.2d 1119 (5th Cir.1980).

The record reflects, however, that Federal Probation and Parole Officer Robert Mitchell testified without objection that he supervised appellant after his release on parole for the possession of stolen mail conviction. Mitchell further testified he classified appellant during his parole as a "high risk case," and, although he had the authority, he did not recommend appellant be issued a "certificate of expungement" prior to the time appellant's sentence expired. Instead, appellant's parole was automatically terminated at the expiration of his sentence on March 15, 1979. [FN11]

> FN11. As noted earlier, the instant offense occurred on March 31, 1979.

[22] Appellant's failure to object to the testimony of Mitchell waived any error as to the introduction of State's Exhibit No. 51. Boles v. State, 598 S.W.2d 274 (Tex.Cr.App.1980). Moreover, this Court has consistently held that proof of even unadjudicated extraneous offenses at the punishment phase of a capital murder case is admissible pursuant to the authority of Art. 37.071(a), V.A.C.C.P. Smith v. State, 683 S.W.2d 393 (Tex.Cr.App.1984) (reh'g den. Jan. 30, 1985); Rumbaugh v.

State, 629 S.W.2d 747 (Tex.Cr.App.1982); Williams v. State, 622 S.W.2d 116 (Tex.Cr.App.1981), *cert. denied,* 455 U.S. 1008, 102 S.Ct. 1646, 71 L.Ed.2d 876 (1982); Crawford v. State, 617 S.W.2d 925 (Tex.Cr.App.1980), *cert. denied* 452 U.S. 931, 101 S.Ct. 3067, 69 L.Ed.2d 431 (1981), *reh. denied,* 453 U.S. 923, 101 S.Ct. 3160, 69 L.Ed.2d 1005 (1981); Milton v. State, 599 S.W.2d 824 (Tex.Cr.App.1980), *reh. denied* 620 S.W.2d 115 (Tex.Cr.App.1980), *cert. denied,* ***83**451 U.S. 1031, 101 S.Ct. 3022, 69 L.Ed.2d 400 (1981), *reh. denied,* 453 U.S. 923, 101 S.Ct. 3160, 69 L.Ed.2d 1006 (1981); Brooks v. State, 599 S.W.2d 312 (Tex.Cr.App.1979), *cert. denied,* 453 U.S. 913, 101 S.Ct. 3146, 69 L.Ed.2d 996 (1981), *reh. denied,* 453 U.S. 950, 102 S.Ct. 25, 69 L.Ed.2d 1036 (1981); Quinones v. State, 592 S.W.2d 933 (Tex.Cr.App.1980),*cert. denied,* 449 U.S. 893, 101 S.Ct. 256, 66 L.Ed.2d 121 (1980), *reh. denied,* 449 U.S. 1027, 101 S.Ct. 600, 66 L.Ed.2d 490 (1980); Green v. State, 587 S.W.2d 167 (Tex.Cr.App.1979), *cert. denied,* 453 U.S. 913, 101 S.Ct. 3146, 69 L.Ed.2d 996 (1981), *reh. denied,* 453 U.S. 927, 102 S.Ct. 889, 69 L.Ed.2d 1022 (1981); Hammett v. State, 578 S.W.2d 699 (Tex.Cr.App.1979), *pet. dismissed,* 448 U.S. 725, 100 S.Ct. 2905, 65 L.Ed.2d 1086 (1980).

Appellant's seventh ground of error is overruled.

In his eighth and ninth grounds of error, appellant complains of the indictment and court's charge. He contends that the trial court erred in overruling his motion to quash the indictment and in overruling his objections to the court's charge at the guilt-innocence phase of the trial since both the indictment and charge included the culpable mental state "knowingly."

He contends that the insertion of the culpable mental state "knowingly" in the indictment authorizes a conviction for felony murder under V.T.C.A. Penal Code, § 19.02(a)(3), instead of capital murder under V.T.C.A. Penal Code, § 19.03(a)(2), and as such is duplicitous and fails to give him precise notice of the charge against him. He further argues that the charge of the court is ambiguous in that it authorizes the jury to convict upon a finding of a culpable mental state less than that permitted by statute. [FN12]

FN12. See V.T.C.A. Penal Code, § 6.02(d).

Appellant's indictment, in pertinent part, alleged that the appellant:
"did then and there intentionally *and* knowingly cause the death of an individual, namely: JOHN G. EBBERT, hereinafter called complainant, by SHOOTING THE SAID COMPLAINANT WITH A GUN, and the said defendant did then and there intentionally cause the death of the said complainant while in the course of committing and attempting to commit the offense of ROBBERY, AGAINST THE SAID COMPLAINANT..."

The court's charge to the jury stated in pertinent part:
"Now if you find from the evidence beyond a reasonable doubt that ... Miguel A. Richardson, did intentionally or knowingly cause the death of John G. Ebbert, by shooting the said John G. Ebbert with a gun, and the said Miguel A. Richardson, did then and there intentionally cause the death of the said John G. Ebbert while in the course of committing or

attempting to commit robbery of John G. Ebbert, you will find the defendant guilty of capital murder."

Thus the portion of the charge that applies the law to the facts strictly followed the allegations in the indictment by authorizing the jury to convict if they found the defendant intentionally or [FN13] knowingly caused the death of the victim *and* intentionally caused the death while in the course of committing or attempting to commit the robbery of the victim.

> FN13. The appellant does not complain of the discrepancy between the indictment's "intentionally *and* knowingly" and the "intentionally *or* knowingly" language in the court's charge to the jury. We have held in the past that such does not constitute error. Hammett, supra. See also Cowan v. State, 562 S.W.2d 236 (Tex.Cr.App.1978).

[23] Capital murder is committed when a person commits murder, V.T.C.A. Penal Code, § 19.02(a)(1), with at least one of the aggravating factors contained in the capital murder statute, V.T.C.A. Penal Code, § 19.03. [FN14] Combining the elements of the two statutes we find that capital murder ***84** under § 19.03(a)(2) is committed when a person intentionally or knowingly causes the death of an individual (murder under § 19.02(a) (1)) *and* intentionally commits the murder in the course of committing or attempting to commit robbery. That is precisely what the indictment and the court's charge to the jury authorized in the instant cause. We have in the past implicitly approved of similar indictments and charges.

Wilder v. State, 583 S.W.2d 349 (Tex.Cr.App.1979), judgment vacated and case remanded on other grounds, 453 U.S. 902, 101 S.Ct. 3133, 69 L.Ed.2d 987 (1981), opinion on remand, 623 S.W.2d 650 (1981); Hammett, supra; Granviel v. State, 552 S.W.2d 107 (Tex.Cr.App.1976), *cert. denied,* 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977); White v. State, 543 S.W.2d 104 (Tex.Cr.App.1976), *cert. denied,* 430 U.S. 988, 97 S.Ct. 1689, 52 L.Ed.2d 384 (1977).

> FN14. V.T.C.A. Penal Code, § 19.03, the capital murder statute, provides in pertinent part:
> "(a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and: ...
> "(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, or arson...."

[24] Article 21.02, V.A.C.C.P., provides that in an indictment, the offense must be set forth in plain and intelligible words. Further, Art. 21.11, V.A.C.C.P., provides an indictment "shall be deemed sufficient which charges the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged."

In turn, the trial court's charge to the jury generally should correspond to the allegations in the indictment. Jackson v.

State, 633 S.W.2d 897 (Tex.Cr.App.1982); Booker v. State, 523 S.W.2d 413 (Tex.Cr.App.1975).

[25] The indictment in question literally followed the statute, was written in ordinary and concise language, and neither mislead appellant nor failed to give him fair notice of the offense charged. Moreover, we find that the indictment clearly alleges that appellant is being charged with capital murder under § 19.03(a)(2), and not felony murder under § 19.02(a)(3).

[26] We also find that the court's charge, which properly required that the jury find that the appellant *intentionally* caused the death while in the course of committing or attempting to commit robbery, properly tracked the indictment and the statute and was neither ambiguous nor did it permit the jury to convict the appellant upon a finding of a culpable mental state less than that required by statute.

Appellant's eighth and ninth grounds of error are overruled.

In his tenth ground of error, appellant contends the trial court erred in permitting the State to introduce into evidence certain items seized during a search of appellant's car by Colorado police officers pursuant to a search warrant issued by a Colorado magistrate. The items seized and introduced at trial were two wigs, a business card for "On the Top in High Fashion Modeling Agency," and an invoice for the purchase of business cards for the same modeling agency.

The State's apparent motive in introducing the invoice and business card was to prove that appellant was the man who

was registered at the Holiday Inn at the time of the offenses under the alias of Michael Coleman and who stated on the hotel registration card that his firm was called "On the Top in High Fashion." The record reflects, however, that this fact was clearly established in the record by the testimony of the State's witnesses. All three of the women who were traveling with appellant testified appellant was staying at the Holiday Inn at the time of the murders; Bearden testified that appellant often used aliases and checked into the Holiday Inn on the date in question under the alias Michael Coleman; Seiver testified that appellant admitted being a registered guest, under the alias of Coleman, at the Holiday Inn at the time he killed the security officers; and, most significantly, *the desk clerk who registered appellant clearly identified appellant as the man who registered as Michael Coleman and who stated his company was called "On the Top in High Fashion."* That appellant was a registered guest at the Holiday Inn at the time of the offense was established beyond a reasonable doubt by evidence separate from that seized as a result of the Colorado search.

***85** [27] The two wigs were apparently offered by the State in an attempt to corroborate the testimony of Bearden and Franklin that appellant told them he had put on a wig on the night in question in order to disguise himself during his attempt at robbing the women in room 494. The record reflects, however, that appellant also told Seiver that he oftentimes wore a wig as a disguise and that he was wearing one at the time of the shooting. Accordingly, testimony other than that obtained as a result of the search established that fact. We also note that whether or not appellant was wearing a

wig at the time of the offense, under the facts of this case, is of little moment to the identity of appellant as the person who murdered the two guards.

Without reaching the merits of appellant's claims regarding the legality of the search and seizure of the items, we find that the admission of the items was cumulative and harmless beyond a reasonable doubt. Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); Nickerson v. State, 660 S.W.2d 825 (Tex.Cr.App.1983); Wood v. State, 573 S.W.2d 207 (Tex.Cr.App.1978).

Appellant's tenth ground of error is overruled.

Appellant's eleventh ground of error, concerning voir dire, was disposed of at the beginning of this opinion and was overruled.

In his twelfth and final ground of error, appellant contends that the trial court erred in refusing his requested charges at the punishment phase of the trial regarding mitigation. This Court has consistently overruled similar grounds of error made by other defendants. Stewart v. State, 686 S.W.2d 118 (Tex.Cr.App.1984); Quinones v. State, 592 S.W.2d 933 (Tex.Cr.App.1980), cert. denied, 449 U.S. 893, 101 S.Ct. 256, 66 L.Ed.2d 121 (1980), reh. denied, 449 U.S. 1027, 101 S.Ct. 600, 66 L.Ed.2d 490 (1980). We decline to overrule same. [FN15]

> FN15. Although the author of this opinion joined in the dissenting opinion in Stewart, supra, concerning

> this same issue, the rules of stare decisis compel the above holding. Johnson v. State, 691 S.W.2d 619, (Tex.Cr.App.1984) (Clinton, J., concurring).

Appellant's twelfth ground of error is overruled.

Appellant has also filed a pro se writ of habeas corpus which we deem a pro se brief. Although appellant is not entitled to hybrid representation, we have in the interest of justice examined same and find no error that should be considered in the interest of justice. Rudd v. State, 616 S.W.2d 623 (Tex.Cr.App.1981).

The judgment of the trial court is affirmed.

WHITE, J., not participating.

CLINTON, Judge, dissenting.

The treatment given to appellant's ground of error eleven is erroneous in two respects, in my view. First, the majority is wrong to dismiss appellant's complaint against the *sua sponte* nature of the trial court's action on the basis that such complaint does not comport with his trial objection. The majority would require appellant to articulate what was obvious to all present, indeed is obvious from the cold record, *viz:* that he was objecting to *the trial court's* exclusion of the venireman on the basis of Article 35.16(a)(10), V.A.C.C.P., when the full predicate for such exclusion had not been laid by either the trial court or the State. To hold that error was not preserved in this context is just pedantic, Moore v. State, 542 S.W.2d 664, 668 (Tex.Cr.App.1976) notwithstanding. See

Hernandez v. State, 643 S.W.2d 397 (Tex.Cr.App.1983) (Teague, J., dissenting).

More disturbing, however, is the analysis by which the majority distinguishes Grijalva v. State, 614 S.W.2d 420 (Tex.Cr.App.1981). After observing that it was in response to a challenge for cause from the State that the venireman in *Grijalva* had been erroneously excused, the majority concludes:
"The State in no way prompted the erroneous excusal nor did it have an opportunity to timely exercise a peremptory challenge against him. [footnote omitted.] In short, this venire member was never passed first to the State and then to the ***86** appellant for challenges according to the requirements of Art. 35.13, V.A.C.C.P. Thus, the 'corruption of the peremptory strike practice' that gave the state 'an unfair advantage,' so condemned in *Grijalva,* is absent from this case."

At p. 71, quoting Bell v. State, 724 S.W.2d 780, at 796 (Tex.Cr.App.1986). With deference, this facile distinction does not withstand scrutiny.

In *Grijalva,* no less than in the instant case, opportunity for the orderly conduct of peremptory challenges by *both* sides was preempted by erroneous excusal of the venireman by the trial court. That here that excusal was *sua sponte* does not invalidate the rationale of *Grijalva.* Whether the venireman was excused in response to a State's challenge for cause or *sua sponte,* to call the erroneous excusal harmless on the basis that the State had remaining peremptories is effectively to afford the State an out of time peremptory challenge (or, as

the majority labels it, "constructive use" of a remaining peremptory) to retroactively correct the error. Circumvention of the statutorily mandated order for the exercise of peremptory challenges in a capital case is just as manifest here as it was in *Grijalva*. [FN*]

FN* In *Bell v. State*, supra, at 796, the Court elaborated upon its present rationale in similarly distinguishing *Grijalva*, thus:
"... *Grijalva* is founded on the notion that the State *caused* the improper excusal by issuing a challenge for cause, and is therefore penalized because of the advantages it would otherwise receive by holding a peremptory strike back. Where the trial judge, not the State, is solely responsible for the improper excusal, the justification for penalizing the State under *Grijalva* disappears." I had not understood *Grijalva* to be "founded on the notion that the State *caused* the improper excusal," and should therefore be "penalized." I should think that, inasmuch as it is said to thwart the dictates of Article 35.13, supra, by giving the State "the benefit of making its judgments with a perspective of the entire panel, a perspective which is not given the defendant[,]" 614 S.W.2d at 424, to allow retroactive application of remaining State peremptories to cure the otherwise reversible error of excusing a qualified venireman over objection would be equally disruptive whether the State "caused" the trial court to excuse the venireman or the court acted of its own volition. The point is not to penalize the State, but to avoid penalizing the defendant.

Finding no meaningful distinction between this case and *Grijalva,* I respectfully dissent.

TEAGUE and DUNCAN, JJ., join this opinion.

END OF DOCUMENT

IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

EX PARTE MIGUEL
A. RICHARDSON

Habeas Corpus Application

WRIT NO. 29,821-02

From BEXAR County

ORDER

This is an application for a writ of habeas corpus transmitted to this Court pursuant to the provisions of Article 11.071, V.A.C.C.P. Applicant was convicted of capital murder in the 175th District Court of Bexar County and sentence was assessed at death following affirmative replies to the special issues submitted to the jury pursuant to Article 37.071, V.A.C.C.P.

In the present application Applicant raises fifteen allegations challenging the conviction or the penalty assessed. An evidentiary hearing was conducted by the trial court after which the judge entered findings of fact and conclusions of law and a recommendation that all relief requested be denied. We have reviewed the record from that hearing along with the application itself and its supporting documentation. We find that the findings of fact and conclusions of law are fully supported by the record and that the recommendation should be followed.

Accordingly, all relief requested is denied.

IT IS SO ORDERED THIS THE 10TH DAY OF JUNE, 1998

PER CURIAM

DO NOT PUBLISH

EX PARTE MIGUEL A. RICHARDSON
WRIT NO. 29,821-02

Habeas Corpus Application from BEXAR County

DISSENTING OPINION

This is a post-conviction application for writ of habeas corpus filed pursuant to Tex. Code. Crim. Proc. Ann. art: 11.071.[1] Applicant presents a claim for relief based upon a belief that his "constitutional rights to the effective assistance of counsel, to present mitigating evidence, and to due process and a fair trial were violated by the trial court's

---

[1] The procedural history of applicant's case is as follows:

- Defendant was convicted of capital murder in Bexar County on Sept. 10, 1981.
- We affirmed, 744 S.W.2d 65 (Tex.Cr.App. 1987).
- On petition for writ of certiorari, the United States Supreme Court vacated and remanded, 492 U.S. 914, 109 S.Ct. 3235.
- On remand, we again affirmed, 886 S.W.2d 769 (Tex.Cr.App. 1991).
- On petition for writ of certiorari, the United States Supreme Court again vacated and remanded, 113 S.Ct. 3026.
- On remand, we again affirmed, holding that: (1) evidence of defendant's voluntary service and kindness to others, artistic and poetic talent, and religious devotion, did not require separate special jury charge during punishment phase; and (2) allegedly mitigating evidence of defendant's character and upbringing did not require separate special jury charge. 901 S.W.2d 941 (Tex.Cr.App. 1994)
- Certiorari was denied June 26, 1995. 115 S.Ct. 2617.

allowance of the testimony of Dr. Rast, a surprise witness.[2] Believing this claim should be remanded to the habeas court for findings of fact in light of Estelle v. Smith, 602 F.2d 694 (5th Cir. 1979), I dissent.

Originally the State had filed a witness list with no doctors, psychiatrists or psychologists designated. Upon inquiry from the defense, the State amended the witness list to include Dr. Grigson and Dr. Schroeder as expert witnesses. However at trial, the State did not call either of these designated expert witnesses; instead, the State called Dr. Rast, who was not on the State's witness list. The defense objected stating:

> The Defendant has never been apprised that this gentleman on the witness stand will be a witness. We don't know who he is. We don't know what he is. I've never heard his name before it was called by the prosecutor to bring the man into the courtroom. We are surprised. We are not prepared to meet, explain or rebut his testimony, whatever it may be. We have no idea what it may be. I understand the man may be a psychologist.

R. Vol. VII, pp 184-85.

---

[2] Contrary to the trial judge's assertion that this claim for relief was raised and rejected on direct appeal, this issue was never raised under the constitutional parameters of the Sixth and Fourteenth Amendments.

The defense cited Smith v. Estelle, 602 F. 2d 694, 699 (5th Cir. 1979), aff'd on other grounds, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), as support against the surprise testimony of Dr. Rast. In Smith, the Fifth Circuit affirmed the district court's granting of habeas relief, holding the testimony of the surprise witness, Dr. Grigson, violated Smith's Sixth and Fourteenth Amendment Rights to the effective assistance of counsel, his Eighth Amendment right to present mitigating circumstances, and his Fifth Amendment right not to be forced to incriminate himself. Id. 602 F.2d at 698. The Fifth Circuit held:

> Surprise can be as effective as secrecy in preventing effective cross-examination, in denying the "opportunity for (defense) counsel to challenge the accuracy or materiality of" evidence, Gardner v. Florida, 430 U.S. at 357, 97 S.Ct. at 1204, and in foreclosing "that debate between adversaries (which) is often essential to the truth-seeking function of trials," Id. at 360, 97 S.Ct. at 1206.... And despite the trial court's order that the state's attorney list "all the State's witness whom he in good faith expects to use at the trial of the State's case in chief, both during the guilt or innocence state (sic) and the punishment stage," App. 97, the prosecution did not list Dr. Grigson's name. The consequences of this surprise were devastating. Thus the trial judge's informality and the prosecution's tactics combined to give Smith's attorney's no chance to prepare an effective response to Dr. Grigson's testimony or to impeach it

> in any significant way. Surprise in this case impaired "the interest in reliability," Id. at 359, 97 S.Ct. 1197 as much as secrecy did in Gardner.

Smith, 602 F.2d at 700-01.

The difference between Smith and the instant case is that Dr. Rast did not interview applicant, but instead offered an opinion of a hypothetical defendant who committed exactly the same offense as applicant. However, the reasoning of the Fifth Circuit applies here. Defense counsel was completely surprised by Dr. Rast and objected on the record, stating he was unprepared to cross-examine the surprise witness. In fact, the trial judge acknowledged defense counsel was fully prepared to cross-examine the listed witnesses, stating, "I know you were loaded for bear on the other two doctors." R. Vol. VII, pp 197-98.

With these comments, I dissent.

BAIRD, Judge

Overstreet, J., joins this opinion but also believes the first and seventh claims for relief should be filed and set.
Delivered: June 10, 1998
En Banc
Do No Publish